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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

COMMONWEALTH OF MASSACHUSETTS

VOL. XIV.

CONTAINING THE CASES FOR THE YEAR 1817.

WITH A SUPPLEMENT

BY DUDLEY ATKINS TYNG, ESQ.
COUNSELLOR AT LAW.

WITH NOTES

AND

REFERENCES TO THE ENGLISH AND AMERICAN CASES.

BY BENJAMIN RAND, ESQ.
COUNSELLOR AT LAW.

BOSTON:
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1864

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SUFFOLK, MARCH TERM, 1817
AT BOSTON.

PRESENT.

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. CHARLES JACKSON, } JUSTICES.
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, }

JOSEPH WIGGIN AND ANOTHER *versus* JONATHAN AMORY.

A fraudulent purpose, or criminal act, is essential to an act of barratry in the master of a ship.

ASSUMPSIT upon a policy of insurance upon effects on board the ship *Volant*, from her port of lading in *France* to her port of discharge in the *United States*. The policy was in the usual form, dated July 9, 1812, and the subscription of the defendant was for 1000 dollars. The declaration contained several counts. A trial was formally had on the count in which the plaintiffs aver a loss by capture. Upon that trial, the stopping and recapturing an *American* vessel, which was in possession of the *British*, as a prize, was held to be a deviation which discharged the underwriters. (1)

(1) *Vide* vol. xiii. p. 118

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There was also a count for a loss by the barratry of the master in so stopping and recapturing the said vessel. Upon this last count a trial was had before *Parker*, C. J., at the last November term, in this county.

[* 2] * The facts proved at this trial were as follows: The *Volant* was captured, on her homeward voyage, by the *British*, carried to *Halifax*, and there, with her cargo, libelled and condemned as prize; war at that time existing between the *United States* and *Great Britain*. Before the ship sailed from *Bayonne*, where she had been a long time detained, from the difficulty of obtaining permission to unlade her outward and take on board her homeward cargo, the master applied for, and obtained from the *American* minister, a commission and letter of marque, and increased his armament from four to fourteen guns, and his crew from twenty-five or thirty to seventy men.

The ship and outward cargo were addressed to the house of *Morton & Russell*, merchants in *Bourdeaux*, and they were consulted by the master and a Mr. *Bartlet*, who went out as joint supercargo of the *Volant*, (but was not the agent or consignee of the plaintiffs,) as to all important proceedings concerning the ship or voyage, and particularly as to the propriety and expediency of taking the commission aforesaid. Their advice was, to take the commission, it being understood, as was testified by the master and the said *Bartlet*, that the commission was to be taken, and the armament increased, for the purpose of defence only. There were, however, no written directions, tending to restrict the use of the commission; there being no other orders than those which were given at the commencement of the outward voyage, which were to proceed home from *France*, on the return voyage, as expeditiously as possible.

After being out three or four days from *France*, a vessel was descried, which was supposed to be standing for the *Volant*; and attempts were made to avoid her. But the two vessels having approached so near to each other as to enable the master of the *Volant* to ascertain that the supposed enemy was of little force, he wore ship, and demanded a surrender, which was made, and possession of the vessel, which proved to be the *American* brig

[* 3] *Criterion*, lately captured by the *British*, * was taken by the master of the *Volant*, who took her crew on board of his ship, manned the prize, and ordered her for *France*, where she arrived, and was condemned. The time consumed in taking and manning the brig was between two and three hours; which was the delay which, on the former trial, was held to be a deviation. There was no cruising, and no chase, other than what is above stated.

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The jury were instructed by the chief justice, that the taking of a commission, and arming the ship, was not barratry, as it was done with the advice and consent of the merchants in *Bourdeaux*, who were the agents of the owners of the ship, and also with the consent of Mr. *Bartlet*, who was joint supercargo; and that there being no cruising and no chase, the stopping to take a prize, which came in the way, of the *Volant* as aforesaid, although a deviation, because not authorized by the policy, was not barratry; it not appearing that the master was prohibited from so using his commission, or that he had intended to prejudice the interest of the owners of the ship, or that it was contrary to his duty to them.

A verdict being returned for the defendant, the plaintiffs moved for a new trial, on account of the said direction.

Shaw, for the plaintiffs, contended that the facts proved the master of the *Volant* to have been guilty of barratry, and that, the assured in this case not being owners of the vessel, the underwriters were by the terms of the policy, liable for a loss arising from that cause.

Later decisions have much enlarged the signification of the term *barratry*. Formerly it was holden that, to constitute this offence, the act must be for the benefit of the master, as well as injurious to the owners. But it has been since held that any act of fraud or negligence of the master, by which a loss is occasioned, amounts to barratry. (2) Thus, in the case of *Ross* vs. *Hunter*, (3) the mere dropping anchor with a fraudulent intent was an act of barratry, because contrary to * his duty and instructions. [* 4] The case of *Moss & Al.* vs. *Byrom* (4) was very similar to the case at bar, in its facts. The taking a prize, when the orders were to proceed with all expedition, was held to be barratry, although the prize was libelled for the benefit of his owner, as well as of the master; thereby excluding all idea of an injurious intent on the part of the master towards his owner. Nor is it necessary that the loss should follow directly as a consequence of such barratrous act. (5) In *Earle & Al.* vs. *Rowcroft*, (6) Lord *Ellenborough*, after an examination of all the cases, lays it down that the breach of orders, even in the endeavor to advance the interest of his owners, is barratry, in the master. The decision in this case is adverted to, and recognized, in 2 *Campbell's N. P. Rep.* 149.

As to the advice of *Bartlet*, it is enough to say that he was not the agent of the present plaintiffs. As supercargo, he had no

(2) *Marsh.* B. 1, c. 13, § 6. (3) 4 *D. & E.* 33. (4) 6 *D. & E.* 33.
(5) *Cowp.* 143, *Vallejo & Al.* vs. *Wheeler.* — *Lofft*, 645, S. C.
(6) 8 *East*, 126. — See, also, 2 *Caines's Rep.* 67, *Kendrick* vs. *Delafield.* — *Marsh* 534, *Condy's ed.*, *Wilcox* vs. *Union Ins. Company.*

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power in the case. Nor had *Morton & Russell* any authority to instruct the master as to the navigation of his ship. And if it had been otherwise, they did in fact advise to the arming, solely for the purpose of defence, not of capture. The breaking out of the war, while it may justify the arming and taking the commission, yet it made the orders for despatch on the passage still more important and binding on the master. These orders were not countermanded, nor their force impaired, by any communications from the agents in *France*. The delay for an hour, in violation of these orders, was as properly a barratrous deviation as chasing or cruising would have been.

Amory, for the defendant, insisted that an act of the master, to be barratrous, must arise *ex maleficio*, and be a wilful breach of orders, and injurious to the owners; and he argued that the facts in the case at bar by no means came within this description.

PARKER, C. J., delivered the opinion of the Court. In this case, the verdict, which had been returned for the plaintiffs, [* 5] having been set aside, and a new trial * granted, on the ground that the act of stopping to man a prize, which act occasioned a delay of two or three hours, was a deviation, the plaintiffs have attempted, on a second trial, to prevail upon the same facts, on the ground that the deviation proved was a barratrous act on the part of the master; and so that the assured, not being owners of the vessel, but merely shippers of goods, are, by the express terms of the policy, entitled to recover. The verdict was, however, returned for the defendant, in conformity with the direction of the judge, who charged the jury, that the facts proved did not show any wilful breach of duty towards the owners, on the part of the master, nor any fraud or criminality in him.

The question submitted to us, by the motion for a new trial, which has been fully and ably argued, is, whether the charge to the jury was right in point of law; or, rather, whether the facts proved in the case did not require a charge, that an act of barratry had been committed by the master in the transaction, which has already been declared by the Court to be a deviation. The question is of importance, and not altogether free from difficulty; but as we have unanimously come to a result satisfactory to our own minds, we do not think it proper to keep the parties in suspense upon a question highly interesting to them, for the sake of giving a more perfect statement of the reasons which have brought us to this result, than the present opportunity will enable us to do.

Our opinion is, that the act alleged to be barratry was a simple deviation, and not barratry. That every deviation is not barratry, was solemnly decided in the last case, in which the subject has

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been discussed in the Court of King's Bench in *England* — the case of *Earle & Al.* vs. *Rowcroft*, in which Lord *Ellenborough* examined all the preceding decisions, and came to the conclusion, which is warranted by a scrutiny of all the authorities, that it is essential to the offence of barratry, that the act complained of should be either criminal or fraudulent on the part of the master.

* Some of the cases cited by the counsel for the plaintiffs, considered separately, and without relation to other [* 6] cases settled with at least equal solemnity, certainly give color to the doctrine that every act of the master, which is contrary to his duty to his owners, and which may be prejudicial to them, is barratry, although accompanied with no crime or fraud, and even although done with an honest intention to promote their interest. But we apprehend, if these cases are carefully inspected, they will be found not to militate with the rule laid down in *Earle & Al.* vs. *Rowcroft*.

The strongest case cited for the plaintiffs is that of *Moss* vs. *Byrom*. There the master had taken a letter of marque, for the sole purpose of enticing seamen to ship for his voyage, and without any intention to use it for any other purpose; he not having taken certain documents, which were necessary to authorize him to act under his commission. But on his voyage, with the assent of his crew, he stopped and plundered an *American* vessel, having previously determined to cruise for prizes. Afterwards he cruised for some days out of the course of his voyage, and captured a vessel, which he sent into port, whither he followed her, and libelled her as prize, as well for the owners as himself. Aware that he had done wrong, he directed that his cruising should not be mentioned in the log-book. In an action against the underwriters, for a loss by barratry of the master, they were held liable; and it was considered that the stopping to plunder the *American* vessel was in itself barratry, because contrary to his duty to his owners, who were bound by charter-party to proceed with the ship to *Liverpool* as speedily as possible. It is not stated in the case that the act was held to be either criminal or fraudulent on the part of the master; but the decision seems to be placed upon the ground that he had acted contrary to his duty to his owners, and to their prejudice. The defence made by the underwriters was, that the conduct of the master did not amount to barratry, because it did not appear that he intended to prejudice the interest of his * own- [* 7] ers. But the court determined that it was immaterial what his intentions were, provided he had violated his duty.

If this case stood alone, it would go far to support the plaintiffs' claim in the present action; for, although it is difficult to exculpate

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the master from fraud, or perhaps crime, — that is, a breach of law, — in cruising without having the documents necessary to authorize him to cruise, yet it does not appear that stress was laid by the court upon that point. But upon comparing this with cases afterwards decided, and especially with that of *Phyn* vs. *The Royal Exchange Assurance Company*, (7) which appears in the very next volume of the Term Reports, the inference can hardly be avoided, that the circumstances of the first case were considered to afford an imputation of crime or fraud against the master.

In this latter case, goods were insured from *London* to *Jamaica*, and the instructions were, to proceed immediately to *Jamaica*. The ship was carried by currents out of her reckoning to a certain point, from whence her direct course to *Jamaica* was to the south-west, instead of which the master bore up to the north-west about thirty miles, where he brought the ship to anchor. There an embargo was laid; and afterwards, news having arrived of war between *Spain* and *Great Britain*, the ship and cargo were seized and condemned as prize. In a suit against the underwriters, one count was for a loss by barratry. It was held to be a deviation, and not barratry; and Lord *Kenyon* held that it could not be barratry, without a fraudulent purpose of the master at the time. The jury found, "that the departure was a deviation, owing to ignorance or something else, but that it was not fraudulent;" and they returned a verdict for the defendants. Upon the motion for a new trial, the court were clearly of opinion that there must be fraud to constitute barratry. And the learned Justice *Lawrence* said he knew of no case in which it is said that the act of the captain is barratry, [* 8] merely because it was against the * interest of the owners; it must be done with a criminal intent; and that the jury, having negatived fraud, had negatived criminality; and so, that it was not a barratrous deviation. Nothing can be more explicit than this doctrine, as laid down by this able judge; and if we do not find it overruled by later decisions, it must be taken to be the settled law of *England*, that fraud or criminality is essential to barratry.

If the prior case of *Moss* vs. *Byrom* had been considered as establishing a principle short of this, certainly some notice would have been taken of that decision. No comment having been made upon it, the inference seems to be irresistible, that fraud was considered as the basis of the decision; notwithstanding, by the reported opinion of the court, it would seem that a breach of duty alone was the ground of the determination. And when we find that the facts in

(7) *D. & E.* 505.

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that case show that the master acted unlawfully in cruising without authority, and fraudulently in suppressing the evidence of his transactions in the log-book, there ought not to be thought any discrepancy between the two cases.

The cases cited, which were decided before those which have been commented upon, affirm no other principle than that which has been deduced from these two principal cases. That of *Vallejo & Al.* vs. *Wheeler* was a case of illicit trade by the master. The doctrine established by it is well expressed in the marginal note. It is, that barratry is every species of fraud or knavery in the master or mariners of a ship, by which the owners or freighters are injured; and a deviation, if such, — that is, if fraudulent or knavish, — is barratry.

The other case, of *Ross* vs. *Hunter*, is founded entirely upon the fraud of the master, in dropping his anchor at the mouth of the River *Mississippi*, and going up the river for fraudulent purposes of his own, instead of proceeding immediately to *New Orleans*, which was the termination of the voyage insured.

No new question seems to have arisen upon this subject in *England* until the case of *Earle* vs. *Rowcroft*; and the doctrine we have adopted is most fully and explicitly * recognized [* 9] in that case by Lord *Ellenborough*. The only point which seemed to be unsettled before that case, was, whether an act of the master, although criminal, was barratry, unless he intended by it to injure or defraud his owners. It seems extraordinary that such a doubt should have existed; and yet we find it contended at so late a period, that an illicit trading with the enemy was not barratry; because the master had in view the benefit of his owners, rather than his own. To settle this point only, was thought to require an elaborate argument of the lord chief justice; but he is careful to prevent any inference being drawn against the principle, before so well settled, that without fraud or crime there can be no barratry; and he closes his argument with a caution not to infer from it that simple deviations can be turned into barratry, to the prejudice of underwriters; for he says there is no case in which barratry can exist without fraud or crime.

We think, after this view of the various decisions in *England*, there can be no longer a doubt of the state of the law there on this subject; and there is no reason why the same doctrine should not be admitted here. We have no decisions which militate with it; and there is no reason why barratry, which is in itself criminal and odious, should be imputed to conduct here which would not have that character in *England*.

There may be violations of duty by a master, which may subject

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him to actions by his owners, and to suitable damages, without charging him with barratry; and it is for barratry only, according to its technical definition and meaning, that underwriters have stipulated to answer. Inferior misconduct is an affair between the owners and the master, for which the underwriters upon a policy do not undertake to indemnify; and there is no reason that they should, since they seldom, if ever, have a voice in the appointment of the master.

Considering it, then, as well-settled law, that a fraudulent [*10] purpose or criminal act is essential to barratry, *we are to inquire whether, from the facts existing in this case, either can be fairly imputed to the master of the *Volant*, in her voyage from *France* to the *United States*.

It has been before decided, in this action, that increasing the armament of the ship, and taking a commission as a letter of marque, furnished no cause of complaint to any one. This alone, even if done without the assent of the owners, would not have been barratry. But it appears that for this the master had the advice and approbation of the agents of the owners and shippers, and of the person who acted with him as supercargo. It is found, by the verdict, that he did not cruise, or even chase; the last of which acts would have been justifiable as regarded his owners, if there had been no restriction upon his use of the commission; and even the underwriters could not complain, if they also, in the policy, had assented to his taking the commission.

But it was *understood* that his commission and his armament were for defence only; and contrary to this understanding, as it is supposed, he captured a vessel, which he had been endeavoring to avoid; and in making this capture, he put about, and was delayed, not by sailing out of his course, but in manning his prize, two or three hours. Was this a fraudulent act? He certainly did not intend to capture the vessel for himself alone; for she was libelled for the owners. And although this alone would not excuse him, yet it may well be considered as evidence of innocent intentions.— Was it a gross malversation in him, as in one of the cases cited? It appears that what he did was by advice of the supercargo, who was on board, of one of the shippers of the goods, and of all the crew. Ought it not rather to be considered as a mistake of his duty under these circumstances? And may he not have innocently been mistaken, when he had a commission, by the consent of all concerned, with no other restriction upon it than an *understanding* that he was to act only on the defensive? And might not [*11] even a discreet man *have supposed that to have taken a vessel which was thrown into his power, was no infringe-

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ment of the understanding, that he was to use his commission de fensively only?

If these are fair inferences from his conduct, there was no fraud; and the jury must have so found, if that question had been precisely put to them. Was the taking of a prize a criminal act? This cannot be pretended; for the vessel captured was in the power and possession of the enemy, and his commission fully authorized him to make prize of her.

There being, then, no fraud, and no crime, there can be no barratry. (*a*)

It is said that he acted contrary to his duty to his owners; because his orders were to proceed immediately home from *France*. Without considering, at this time, whether the subsequent proceedings in *France* ought not to be considered as a qualification of those orders, given so long before, it is a sufficient answer to say, that this may be, and yet no barratry. In the case of *Phyn* vs. *The Royal Exchange Insurance Company*, the orders were to proceed with all possible expedition; yet there was a delay and a deviation, which was held not to have been barratry. Whether the master acted contrary to his duty to his owners, under all the circumstances of the case before us, may be a question; but it is not necessary now to decide it.

It has been urged by the counsel for the plaintiffs, with as much force as zeal and eloquence, without authority, can give, that the former decision in this case, by which the underwriters were discharged, because the very act now complained of was a deviation, necessarily draws after it at this time a decision that the same act was barratry; because the shippers and owners lose their insurance by this act of the master.

But this is assuming that there can be no deviation without bar ratry, which is contradicted by all the authorities. The underwriters stand upon their legal * rights under this con- [* 12] tract. They avoid liability, by showing that the voyage has not been performed according to the implied warranty in the policy. If they ask for law, it must be dealt to them. But we are not at liberty, because a misfortune has occurred, for which no indemnity can be had in one form, to give it in another, against the principles of law. In order to help the assured, we cannot hold that to be barratry, to which the law has not given that character. (*b*)

Judgment on the verdict.

(*a*) [*Todd* vs. *Richie*, 1 *Stark.* 240. — *Bottomly* vs. *Bovill*, 5 *B. & Cr.* 210. — ED.]

(*b*) [*Grim* vs. *Phœnix Insurance Company*, 13 *Johns. Rep.* 451; and see cases cited in note to *Abbot on Shipping*, by Mr. Justice *Story*, p. 138. — *Taggart & Al.* vs. *Loring* 16 *Mass. Rep.* 166. — ED.]

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JOSEPH WIGGIN AND ANOTHER *versus* WILLIAM H. BOARDMAN.

Where a ship was insured on a mercantile voyage only, it was holden that the stopping to take possession of a prize, although there was no chasing, was sufficient to avoid the insurance; although it was known to the underwriter, at the time of subscribing the policy, that the ship was armed, equipped, and commissioned, as a letter of marque.

THIS was *assumpsit* upon a similar policy of insurance, and upon the same voyage as that upon which the preceding action was brought, and was tried upon the general issue, November term, 1815, before *Parker*, chief justice. The facts proved at the trial were the same as are stated in the said case of these plaintiffs against *Amory;* with this additional fact, found specially by the jury, that the present defendant knew of the armament and equipment of the *Volant* as a letter of marque, before the policy was subscribed by him. A verdict was returned for the plaintiffs, subject to the opinion of the whole Court.

An argument was had at the last March term, by *Shaw* for the plaintiffs and *Prescott* and *Welsh* for the defendant.

Welsh contended that the mere knowledge of the underwriter, that the ship was armed, and had a commission as letter of marque, could have no operation in the case. The ship is described in the policy as a merchant vessel merely; and to introduce this evidence would be to change the written contract of the parties by parole testimony. (1) The consent of the underwriter, that the [*13] ship should stop to take and man * prizes, cannot be inferred from his knowledge of the equipment and commission Nothing more is to be inferred, than that she could and would defend herself if attacked. The existence of the war was known to the parties at the time of making the contract; and if they had intended to include a right to capture prizes, it ought, and it naturally would have been provided for in the policy. (2)

Shaw argued that the ship in this case was virtually insured as a letter of marque. The knowledge of the fact by the defendant being found by the jury, must have the same operation, as if a representation had been made of the same fact by the plaintiffs at the time of proposing the insurance. No representation was necessary. Where a fact is as well known to the underwriter, as

(1) *Marsh*, 370, *Mills & Al.* vs. *Roebuck.*
(2) 5 *D. & E.* 580, *Denison* vs. *Modigliani.* — 6 *D. & E.* 379, *Moss* vs. *Bloom.* — 1 *East*, 130, *Robertson & Al.* vs. *French.* — 6 *East*, 45, *Lawrence & Al.* vs. *Sydebotham.* *Ibid.* 262, *Parr* vs. *Anderson.*

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to the assured, it needs not be stated; as in the case of a voyage in which it is known that none but an illicit commerce can be carried on. (3) Parole evidence of the state of facts, upon which an insurance is made, is always admitted.

If, then, the ship may be fairly considered as insured by the defendant as a letter of marque, he must be liable for the loss; unless the transaction in evidence was unjustifiable for a ship of that description. But it is well settled that a ship, having a commission as a letter of marque, may chase and capture vessels which she comes in sight of in her course, though she may not cruise. (4)

Prescott, in reply. Had the ship been expressly insured as a letter of marque, the deviation in this case would have avoided the policy. The arming and the commission did not affect the risk; but the laying to and putting about for the prize were an essential alteration of the risk. It was the same in effect as a cruising for the same time, which would not have been a justifiable deviation even for a letter of marque.

But in truth this ship was not insured as a letter of marque. The fact of her being such was known to the plaintiffs; and if they intended that she should *conduct as such, they [*14] should have provided for it in their contract. It is not the taking of the commission, but the using of it, which the defendant claims to avail himself of, as avoiding the insurance.

The action stood over to this term under advisement; and now the opinion of the Court was delivered by

PARKER, C. J. In the case of *Wiggin & Al.* vs. *Amory*, it was decided by us that the mere fact of taking a commission as a letter of marque, after a policy had been effected upon goods shipped on board a merchant vessel, without the knowledge or consent of the underwriter, had no effect upon the policy; the Court not admitting the doctrine, that a temptation to deviate avoided the contract, as was laid down in the case of *Denison* vs. *Modigniani*.

But it was also decided that the actual use of such a commission, by capturing a vessel, when by such capture a delay of the voyage, although but for a short time, was the consequence, did discharge the underwriters; because it amounted to a deviation not justified by necessity, and because such act was not provided for in the policy; the ship being insured as a merchant vessel only, without reference to any other employment. (*a*)

(3) *Marsh*, 54. *Lever* vs. *Fletcher*. — 6 *Mass. Rep.* 112.
(4) *Marsh*, 402, *Jolly* vs. *Walker*. — 6 *East*, 202, *Parr* vs. *Anderson*.
(*a*) [In *Haven* vs. *Holland*, *Mason*, 230, Mr. Justice *Story* said, "Whether a vessel be commissioned or not, she has a right to repel any attempt of an enemy, and to protect and defend herself by all reasonable precautions against a meditated hostile attack

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The facts in the case at bar are in all respects like those which appeared in the case of *Wiggin & Al.* vs. *Amory*, except that in the present case the jury have found that, before the defendant subscribed the policy, he knew that the ship was armed and equipped, and commissioned as a letter of marque.

We are now to determine what effect this knowledge will have upon the contract of assurance; and after some doubt, we are all of opinion that the underwriter is not for that cause liable. The knowledge that a vessel is armed, and has a commission, does not necessarily carry with it an assent that the vessel shall do any thing which may cause a delay of her voyage, or that her commission shall be used, except for defence. It may be that she is armed only for the purpose of defence, and that her commission [* 15] is to be used only to * justify the attack of such vessels as may come in her way; and possibly the capture of such vessels, if that can be done without delaying the voyage. And the knowledge of such armament and commission may render it unnecessary to represent the true state of the vessel, in order to make the underwriter liable, in case the risk should be increased thereby. But it cannot amount to an assent that any deviation from, or delay of, the voyage should take place, in consequence of the new character of the vessel. By the policy it appears that a merchant vessel was insured for a mercantile voyage only; and to bind the underwriter, in case any other use should be made of her, there ought to have been a stipulation to that effect in the policy.

It is laid down by *Marshall*, (p. 277,) that the voyage must be truly and accurately described in the policy. The voyage insured by the policy in this case, is from *Bayonne* to her port of discharge in the *United States*. Had the vessel been described as a letter of marque, it is held that the insured would be protected, even if a departure from the course of the voyage had taken place

If a vessel, supposed to be an enemy cruiser, be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defence, and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to make his escape in the first instance, and, on a failure of this, to meet the enemy. He may lay to or chase the enemy, if he deem that the most effectual way to secure his object. The only question, in cases of this nature is, whether what is done is fairly attributable to a mere intention of self-defence, or to motives of another nature, such as a desire of profit. If the latter, then it is a deviation." "If the capture was made in self-defence, the master had a right to take possession of his prize, and if, without injuriously weakening his own crew, he could man the prize, he had a right to do so, and the delay for the purpose was not a deviation. He had a right to make the capture effectual, to prevent the enemy from recommencing the attack, or giving information to other cruisers. The right of capture drew after it the other incidents. It would be most mischievous to the interests of trade, and discourage men from making a gallant defence, by knowledge that in no event could they reap a reward for their victory." — See *Whitney* vs. *Haven*, 13 *Mass. Rep.* 172. — ED.]

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in pursuit of a vessel which had hove in sight during the voyage. But this is upon the supposition that it is intended to insure the vessel with the usual privileges of one so commissioned. The same inference, however, cannot be drawn from the mere knowledge that she is so commissioned. For that knowledge may not be inconsistent with a belief and expectation that she will, nevertheless, pursue her voyage home without interruption, being armed solely for the purpose of defence.

No instance can be found, where the knowledge of the underwriter that a deviation was intended, has been set up in excuse for such deviation, or to avoid the effects of it. Such a fact could only be proved by evidence extrinsic to the policy, and, in fact, contradictory to the terms of it; so that by the rules of evidence, which are said to apply as strictly to these contracts as to deeds, no such fact could be inquired into. If the * insured means to [*16] protect himself in any adventure, which does not fall within the usual provisions of a policy, or within the known usage of the voyage he insures, he should insist upon a stipulation, which will accommodate his views; and not trust to evidence, which the law will not allow, to vary the bargain, which is proved by the writing. (*b*)

Upon this principle alone, that no parole evidence shall be received to vary the terms, or change the effect, of a written instrument, it would be very clear that the plaintiffs could not prevail upon the ground which is assumed.

If it should appear a harsh construction of these contracts between merchants, that an underwriter should be permitted to allege, in avoidance of his contract, an act done in virtue of a commission taken by the vessel, when he knew, at the time of his entering into his contract, that the vessel was so commissioned, it would be a sufficient answer for us, that such is the law. If there is any violation of good faith, it is not for us to award the penalty. But it may be said, in behalf of the underwriter who offers this defence, that nothing is proved to have been assented to by him, but that the vessel should be armed and commissioned; and that the use of her commission, for any other purpose than safety and defence, may have been as unexpected to him, as a chase or a cruise in quest of prizes. All that we have to do, however, is, to ascertain and declare the law upon the case before us; and we are confident that the fact found by the jury does not entitle the plaintiffs to recover

Plaintiffs nonsuit.

(*b*) [*Ewer vs. The Washington Insurance Company*, 16 *Pick.* 502. — ED.]

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* JOHN TILLEY *versus* JOSIAH FARROW.

A registered vessel bound coastwise from the port of *Boston* to another port in the *United States*, and from such other port to a foreign country, is a coaster within the exception in the *Stat.* 1796, c. 85, § 2, for regulating pilotage, and so is not obliged to take a branch pilot on board.

THIS was an action of debt, to recover the penalty of fifty dollars given by the statute of 1796, c. 85, entitled "An Act in addition to an Act entitled an Act for regulating pilotage in the several ports in this commonwealth, and for otherwise regulating the pilotage of the port of *Boston*."

The action was submitted to the determination of the Court upon the following facts agreed by the parties:—

The defendant, on the 28th of July, 1815, was master of the brig *Œconomy*, of *Boston*, then lying in the harbor of *Boston*, ready for sea, and drawing more than ten feet of water, and not being a fishing vessel. The plaintiff was on that day, and long before, a branch pilot, duly appointed and qualified; and on that day went on board said brig, and informed the said *Farrow*, that he was such branch pilot, and was ready to carry the said brig to sea; and produced his branch, and the law imposing a penalty on any person who should conduct a vessel to sea without a pilot. The said *Farrow* refused to take the plaintiff, or any other person, as pilot, saying he knew the law, and intended to be his own pilot; and he did, on the same day, pilot the said brig to sea from the port of *Boston*, having no pilot on board, nor having himself a branch, or acting under one. The said brig was registered at the port of *Boston* and *Charlestown*, cleared at the custom-house of that port for the port of *Alexandria* in *Virginia*, and sailed to that port, it being her first voyage. From *Alexandria* she proceeded to a port in *Europe*.

If, on these facts, the Court should be of opinion that the said brig was not a coasting vessel, within the meaning of the act declared on, the defendant was to be defaulted, and judgment to be rendered for the plaintiff for the penalty. If the opinion of the Court should be, that she was a coasting vessel, and not bound to take
[* 18] a * pilot, the plaintiff was to become nonsuit, and the defendant to recover his costs.

Welsh, for the plaintiff, relied on the statute above mentioned, by the second section of which it is enacted, "that no person shall undertake to pilot any vessel drawing nine feet of water, or more, (coasters and fishing vessels excepted,) into or out of the harbor of *Boston*, without having obtained a commission or branch, as is here

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inafter provided, under the penalty of fifty dollars for each offence; and he contended that by coasters, in the exception, were intended vessels enrolled and licensed for the coasting trade only, and not registered vessels, as the *Œconomy* was, even when bound coastwise.

Savage for the defendant.

PARKER, C. J., delivered the opinion of the Court. The question submitted to us by the statement of facts agreed by the parties in this case is, whether the vessel mentioned therein, at the time when the penalty is supposed to have been incurred, should be considered a coasting vessel, within the meaning of the terms used in the exception in the section of the statute giving the penalty. All vessels drawing nine feet of water, or more, are within the express provisions of the statute, except coasters and fishing vessels. The vessel in this case was registered, but was bound from the port of *Boston* to *Alexandria*, from whence she was destined to, and actually went upon, a foreign voyage.

By the laws of the *United States*, a vessel enrolled and licensed is considered as a coaster, and under that character may sail from any port or district within the *United States*, to any other port or district within the same; and although registered, so that she may proceed from the *United States* to a foreign port or place, yet she has the privileges of a coasting vessel, while engaged in trade from district to district, as is provided by the law of the *United States*, passed February 18, 1793, subject only to a tonnage duty. A registered vessel may, therefore, be a coasting vessel, * and [* 19] as such is fairly within the exception in the statute of the commonwealth, upon which this action is founded.

The broader ground, taken by the counsel for the defendant, that under the last-mentioned statute, every master of a vessel may pilot his own vessel, and that the object of the statute is only to regulate the pilotage of such vessels as may choose to take a pilot, we cannot accede to. The legislature did not mean to give an option to masters of vessels, to take a pilot or not, as they might see fit, except in the case provided for in the eighth section of the statute, in which the right is given to the master of a vessel coming from a foreign port, upon the terms therein expressed.

The second section of the act provides that no person shall undertake to pilot any vessel, coasting and fishing vessels excepted, into or out of the harbor of *Boston*, &c., and by the fourth section the branch pilot is authorized and directed to take possession of any vessel, &c., and pilot her; first showing the master his branch, &c. The privilege given to the master of a vessel coming *from* a foreign port to refuse the pilot, upon paying half the fees, if boarded without the lighthouse, and to pilot his vessel in himself without

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paying any fees, if he shall have passed the lighthouse, cannot be construed to give any vessel bound out, excepting coasting and fishing vessels, the privilege of sailing without a pilot. At least, this seems to us at present to be the true construction of the act. But as it is not necessary to decide this point, in order to settle the action before us, we withhold a definitive opinion upon it.

Plaintiff nonsuit

[* 20]

* BENJAMIN S. WILLIAMS *versus* JONATHAN AMORY

An execution may be extended on an estate of the judgment debtor in reversion or remainder.

It was certified by a justice of the peace, on an execution, that A C was sworn to appraise the real estate of the judgment debtor. B C made the appraisement; and the sheriff returned that he had caused B C to be sworn, &c., and it was held well enough.

Where the sheriff failed to certify in his return upon an execution, which he had extended on the real estate of the judgment debtor, that the appraisers were discreet and disinterested freeholders, the extent was holden void.

THIS was a real action, in which the said *Williams* demanded of the tenant *Amory* possession of a certain piece of land in *Boston;* and it was submitted to the decision of the Court upon the following facts agreed by the parties:—

On the 5th of April, 1780, *Benjamin Sault* was seised in fee of the demanded premises, and on that day granted the same to *Margaret Williams* for life, with remainder in fee to *Benjamin S. Williams*, the father of the demandant; and thereupon the said *Margaret* entered upon the premises, and she and the said *Benjamin S.*, the father, became seised thereof according to their respective estates therein.

On the 7th of November, 1788, one *Jerathmeel Bowers* caused the said remainder of the said *Benjamin S.* to be attached in a suit, wherein he recovered judgment in September, 1789, for £285 12*s.* 9*d.* damage, with costs. Immediately after the rendition of the said judgment, the said *Bowers* sued out his execution thereon, and directed it to be extended (among other things) upon the remainder of the said *Benjamin S.* in the demanded premises. This was accordingly done, in the manner and at the time certified by the then sheriff of this county, in his return upon the execution, a copy of the same being filed in the case.

The execution was in legal form, and was dated September 15,

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1789. On the back thereof is written, first, a certificate of *Israel Keith*, a justice of the peace, dated October 7, 1789, that *Benjamin Waldo*, *Benjamin Davis*, and *Joseph Russell*, were sworn faithfully and impartially to appraise, &c. Then follows a certificate, that the subscribers thereto, being duly chosen and sworn, &c., did, by direction of the creditor, repair to a certain *lot of land* situate in *Boston*, and * having carefully viewed and examined [*21] *the same*, did, upon their oaths, appraise and value *the same premises* at the sum of, &c., in part satisfaction of the execution. Dated October 9th, and signed *Benjamin Waldo*, *Edward Davis*, *Joseph Russell*. Then follows the sheriff's return: "Boston, October 9, 1789. Pursuant to the within writ of execution, I caused *Edward Davis*, on my part, to be appointed; the creditor, on his part, appointed *Benjamin Waldo*, and *Jacob Williams*, attorney to the said *Benjamin S. Williams*; the debtor, he being absent, appointed *Joseph Russell*, on his part, to appraise such real estate as should be shown by the said creditor to satisfy the same, and all charges intervening; and they being duly sworn faithfully and impartially to appraise the same, the said creditor's attorney did show a certain lot of land, as the property of the said *Benjamin S. Williams* in remainder in fee, bounded, &c., [including the demanded premises;] the said appraisers, considering the premises as the estate of the said *Benjamin S. Williams* in fee, in remainder after the life of *Margaret Williams*, valued the premises, after being duly sworn, at the sum of, &c.; and so far, in part, I return this execution satisfied, by direction of the creditor." Lastly, The creditor certifies that the sheriff had so extended the execution by his direction that he is therewith content, has received possession of the premises from the sheriff, and orders him to return the execution in part satisfied accordingly. The execution and the return thereon were duly recorded within three months thereafter, and were to be considered as part of the case.

The said *B. S. Williams*, the elder, died on the first day of June, 1791, intestate, leaving the demandant, an infant, his only child and heir, having been born in the same year.

The said *Margaret*, tenant for life, died on the second day of August, 1794; upon whose death the said *Bowers* entered, by virtue of his said extent and levy of his execution, and took actual possession of the demanded * premises; and he, or his [*22] assigns, of whom the tenant, by sundry mesne conveyances, is one, have continued seised and possessed, and have ever since continued to hold the same, by force of the attachment, judgment, execution, levy, and extent aforesaid.

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Judgment was to be rendered by nonsuit or default, as the opinion of the Court should be upon the facts stated.

Dutton, for the demandant, contended, 1. That an estate in the remainder could not be thus extended upon; and, 2. That in the case at bar, the proceedings under the execution were insufficient to pass the title, if an estate in remainder was liable to an extent.

That an estate in remainder or reversion could not be extended upon at the common law, he cited the authorities in the margin. (1)

Nor does our statute of executions make remainders and reversions liable to an extent; (2) except only in the case of their having been previously mortgaged, the fourth section of the statute having provided that "all rights in equity of redeeming lands, mortgaged reversions, or the remainders, shall be liable," &c. But then they must be extended as in *England*, by *elegit*, under the statute of *Westm.* 2, (3) or they must be sold as a chattel interest.

Our statute requires that the officer shall give seisin and possession of the land to the creditor. But a reversioner or remainderman has no seisin in fact to be given. (4) And the sheriff would be a trespasser in going upon the land to deliver seisin; so also would the creditor in receiving it.

After the creditor has received seisin from the officer, he has an immediate right to the undisturbed possession; and he may maintain a real action, counting upon his own seisin, or he may have trespass against the debtor. (5) But he can have no such remedies when entitled only to a reversion or remainder.

Further, the statute expressly saves to the widow her dower in all lands taken in execution. But a widow cannot have dower in a reversion or remainder. (6)

[*23] *The statute also gives to the debtor a right to redeem the land within a year from the levy, by tendering to the creditor, or the tenant in possession under his title, the amount of the debt, with the interest, &c.; and if the creditor or tenant shall refuse to release the land, the debtor is entitled to his action of ejectment, and shall recover the possession. But in case of an extent upon a remainder or reversion, the debtor is without remedy;

(1) 2 *Inst.* 394. — *Shep. Touch.* 359. — *Carth.* 128. — 3 *Mod.* 256. — *Dyer*, 373. — *Salk.* 355. — 2 Lord *Ray.* 785. — *Cro. Eliz.* 742. — 8 *East*, 467. — *Com. Dig. Exon.* C. 2, 3, 14.

(2) *Stat.* 1783, c. 57.

(3) 13 *Edw.* I. c. 18.

(4) *Brooke, Abr. Seisin*, 13. — *Co. Lit.* 32, 330, *b. H. & B's. note on sec.* 266. — 1 *Burr.* 109. — *Sullivan's Lectures*, 66, 67. — *Watkins on Descents*, 40, 46, 107, 137.

(5) 3 *Mass. Rep.* 220. — *Ibid.* 523. — 4 *Mass. Rep.* 402. — *Ibid.* 150

(6) *Co. Lit.* § 36. — *Perk.* 340, 345. — *Co. Lit.* 31, 32. — *Finch's L.* 103. — 7 *Mass Rep.* 253.

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although the statute evidently intends that a right to redeem shall always follow the extent.

But whatever may be the law upon the preceding points, in this case there were such defects in the proceedings under the execution, under which the tenant claims to hold the land, as are sufficient to avoid his title.

The justice of peace certifies that *Benjamin Davis* was sworn as an appraiser; yet the sheriff returns that he appointed *Edward Davis*, and this latter, though never sworn, acts and certifies as an appraiser.

The appraisers valued *the land*, and not the estate in remainder, which was all that the debtor had in the land; yet they did not set out the same by metes and bounds, as the statute requires them to do in all cases.

The tenant claims title under a statute. To maintain such title, he must show all the requisitions of the statute complied with. But in this case the sheriff, by whose acts alone the title passes, has not returned that the appraisers were *freeholders*, nor that they were *disinterested and discreet men*, nor that he delivered *seisin and possion* to the creditor, all which are made necessary by the statute. (7)

The counsel for the tenant, being directed by the Court to confine their argument in the defence to the objections to the proceedings under the execution,

W. Sullivan argued that the statute should have a reasonable construction, and from the known laxness of practice among officers at the period of these proceedings, all possible allowances were to be afforded to the doings and returns of officers. The sheriff is a * known officer, and an officer of rank, in whom [*24] great confidence is always placed. It may be presumed that he would allow none but suitable persons to be appointed as appraisers. They certify that they were *duly* selected, and their oath is the best, if not only, assurance of their impartiality. The sheriff certifies that they appraised the debtor's remainder in the land.

Prescott considered it to be wholly a question of evidence, in considering which the lapse of time must have great influence. The appraisers, it appears, were selected by the proper parties. It is a provable fact, that they were disinterested and discreet freeholders. Upon the seisin, which the creditor received, he could have maintained trespass immediately. In such case, had these omissions of the sheriff been objected, he would have been allowed to amend his

(7) See 9 *Mass. Rep.* 141. — 1 *Mass. Rep.* 87. — 2 *Mass. Rep.* 491, 152. — 11 *Mass Rep.* 468. — 10 *Mass Rep.* 313. — 7 *Mass. Rep.* 312. — 8 *Mass. Rep.* 284.

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return, being then alive. By this means the creditor's title would not have been made better; but a defect in his evidence would have been cured. At this distance of time, the Court will presume that what an officer did, he did properly and in conformity with the law; as in the case of *Gray* vs. *Gardner*, (8) after a shorter interval, it was presumed that an administrator had conformed to the requisitions of a statute equally positive, in his conduct respecting the sale of the real estate of his intestate.

PARKER, C. J., delivered the opinion of the Court. In this action the demandant claims to be seised and possessed of a tract of land situated in the town of *Boston;* to which he deduces a title from *Benjamin S. Williams*, his father; and it is agreed that in 1780, one *Benjamin Sault* was seised of the land demanded, and by deed granted it to *Margaret Williams* for the term of her life, with remainder to the demandant's father, the said *Benjamin S. W.*, in fee simple. The tenant for life entered under the said conveyance, and continued in possession until 1794, when she died. *Benjamin S. Williams*, the remainder-man, died in 1791, never having been in actual possession of the land. As he took, by the deed, a [*25] vested remainder in * fee, the title of the demandant, who was his only child and heir, is complete and perfect; unless the land has been transferred by his father during his life, or by some act of law, which interrupts the descent.

The tenant contends that the land was so transferred in the life-time of the said *Benjamin S. W.*, the father; because, in the year 1789, *Jerathmeel Bowers* recovered a judgment against him, and caused the same to be satisfied by extending his execution, in due form of law, upon the right and interest of the said judgment debtor in the said land; and that the said *Bowers* became seised of the said remainder by virtue of the said levy; he having, after the death of the tenant for life, entered into the premises, and occupied the same, until he parted with his title therein. The tenant has all the estate in the land, which the said *Bowers* acquired under his said judgment, execution, and levy.

The title of the demandant is thus legally intercepted, provided the estate of his father in the premises could lawfully be extended upon to satisfy the judgment of *Bowers*, and provided it appears by the return of the doings under the execution, that the levy was duly made by the sheriff.

The demandant's counsel has contended that, by law, an estate not in possession, but in remainder, depending upon a life estate in being, is not subject to be extended upon, in satisfaction of an

(8) 3 *Mass. Rep.* 399.

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execution for debt; and has argued against the levy from the common law, as well as from the statute of the commonwealth of 1783, c. 57.

He is certainly right with respect to the common law, or the ancient *English* statutes, which, if in operation here, are our common law, for by those only one moiety of the lands of a debtor could be taken by the creditor, under the writ of *elegit*; and then the creditor acquired no fee, but only a temporary possession and use of the lands, until out of the rents and profits his judgment was satisfied.

As we have no writ or execution, which can have
* any such operation, it is clear that, unless our statutes [*26] authorize the proceedings in this case, the levy must be bad.

But we think it perfectly clear that, by our statute, a vested remainder or reversion in lands may as well be taken to satisfy a judgment, as an estate in possession; and we believe the question has not before been raised within the commonwealth.

By the second section of the statute above referred to, it is provided that the creditor may levy his execution upon the *real estate* of the debtor. The words used comprehend every species of estate in land; and as a remainder or reversion vested come fairly, both in common parlance and in technical construction, within the terms *real estate*, we think if there were no more decisive indication of the intention of the legislature, the provision would extend to such estates. Remainders and reversions may be aliened by deed, and there is no reason why they should not be liable for the debts of the proprietor.

But by the fourth section of the same statute, the meaning of the legislature is put beyond all doubt. It is provided in that section, that *all rights in equity* of redeeming lands, mortgaged reversions, or remainders, shall be liable to be attached or taken by execution. Now, there would be a singular oversight, in providing that the equity of redeeming such estates, when mortgaged, should be taken while the estates themselves, free of encumbrance, could not be taken. We must suppose, therefore, that sufficient provision had been made for the estates unencumbered by the second section, under the phrase *real estate*. It may be well, also, to observe upon the punctuation, in the printed statute-book, of the fourth section, that if it be proper to alter the position of the comma, so as to read, "all rights in equity of redeeming lands mortgaged, reversions or remainders," the provision for taking these estates would be direct and absolute, without the necessity of resorting to the other parts of the act for construction None of the difficulties, which have

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[* 27] been * imagined in the argument, will follow from this provision of the statute.

As to the right in the debtor of revesting himself with the estate, upon paying his debt within the time of redemption; if an action be necessary, he may undoubtedly maintain it. But as tender of payment within the year will devest the creditor's title, there will be no need of an action; for the debtor will become, by operation of law, re-invested when he shall have entitled himself according to the provisions of the statute.

The supposed difficulty, that the officer cannot enter upon the land to deliver seisin, does not exist. If the law authorizes the levy, the officer may enter, and a seisin of the remainder may be delivered; for the remainder-man is seised, and the creditor is to have the same title in the estate, as the debtor had before the levy. The utmost of this objection is, that the tenant of the life estate may consider the officer, the appraisers, and the creditor, as trespassers. But even this is questionable; for when the law authorizes an act, and nothing is done, but what is necessary to accomplish the act, those who perform it may not be trespassers.

As to the provision respecting dower, it certainly cannot be necessarily inferred from the words of the statute, if the estate in remainder or reversion is liable to be extended upon, that *therefore* the widow shall have dower, although otherwise not dowable. The plain and obvious construction of this part of the statute is, that no woman entitled to dower shall be prejudiced therein, by means of the operation of this statute.

It is very clear, we think, that estates in reversion or remainder may be extended upon, by virtue of this statute, to satisfy executions, which are issued to enforce satisfaction of a judgment for debt. (*a*) The remaining question, then, is, whether the land demanded has been lawfully extended upon; or, in other [* 28] words, whether * the proceedings, which are before us, were conformable to the provisions of the statute.

Several objections have been made to different parts of the proceedings, as they appear by the return of the sheriff; for all the certificates must be considered as parts of his return.

First, there appears to be a mistake in the certificate of the justice of the peace, who administered the oath to the appraisers; he having certified that he swore *Benjamin Davis*, and the appraiser so sworn being *Edward Davis*. Second, the appraisers certify, that they appraised, and set off *the land*, whereas the execution was,

(*a*) [*Penniman* vs. *Hollis*, 13 *Mass. Rep.* 429. — *Atkins* vs. *Bean*, 14 *Mass. Rep.* 464 E.D.]

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in fact, extended upon *the estate* of the debtor, which was a remainder.

Perhaps these exceptions would be fatal, if we considered the certificates of the magistrate, and of the appraisers, as making an essential part of the proceedings to be returned by the sheriff. But having recently determined, in the case of *Eggleston* vs. *Bridge*, in the county of *Berkshire*, that those certificates are not essential, and as, by the return of the sheriff, it appears that *Edward Davis* was sworn, and that the true estate of the debtor was appraised and set off, these objections cannot prevail.

It is, perhaps, new in this part of the commonwealth, that the certificate of the magistrate and of the appraisers need not be made a part of the return; although in the western counties the practice, under very eminent lawyers, has corresponded with this doctrine. The statute requires that the doings on the execution shall be returned by the sheriff. If he certify that the appraisers were duly chosen or appointed and sworn, and that they performed the duty assigned them, it is sufficient. It may, nevertheless, be convenient to continue the old practice; for these certificates, when made, may become a part of the sheriff's return, and, in case of an insufficient certificate by him may supply the defect. We consider the practice usually followed in this part of the commonwealth, of annexing the * certificate of the magistrate and [*29] appraisers, as well calculated to preserve the evidence of what has been done; and we hope it will be persevered in, although, as has been observed, it is not essential to a title under an execution.

We have, then, only to look to the return of the sheriff, to see if there has been a lawful levy upon the land in question; and here we are concerned to perceive a defect, which, we are all of opinion, is fatal to the tenant's title.

It nowhere appears, upon the return, that the persons appointed appraisers were discreet and disinterested men, and freeholders in the county where the land levied upon lies. By the statute these qualifications are made essential and indispensable. Proof cannot be admitted that they did in fact exist; for it must appear by the return of the sheriff. Here is a case, where the defect in the officer's return of his own doings might be supplied by other parts of the proceedings, which he makes a part of his return. But we find it nowhere stated, neither in the magistrate's certificate nor in that of the appraisers, that they were disinterested or freeholders. In the case of *Eddy* vs. *Knapp*, (9) the point was decided, that as the

(9) 2 *Mass. Rep.* 154.

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officer's return did not show a good cause for two of the appraisers being appointed by him, the levy was for that cause void. The defect in this return is, at least, equally important; and the same consequence must follow.

Many cases, cited from our reports, show that the Court has uniformly adherred to the opinion, that every thing made necessary by the statute to pass the property, either in land or chattels, must appear by the return of the officer to have been done. (*b*)

It has been suggested that, after so considerable a lapse of time, a presumption ought to be admitted that the appraisers were properly qualified; and the case of *Gray* vs. *Gardner* was referred to, in which the jury were permitted to presume, twenty years after an administrator's sale, that the administrator had taken the
[*30] * necessary oath, and had posted up notifications, as required by law.

But the cases are not similar. In that case, all that was wanted was *proof* that the fact existed; and there was probable ground to believe that the regular evidence had been lost in the probate office; a presumption, therefore, in favor of the regularity of the proceedings in that case, was thought justifiable. But here the return of the officer is the evidence of title; and that return is deficient in a material circumstance. If the fact could be proved, still the title would be defective, because the return is not complete; it having been determined, as before stated, that the return must show every thing essential. A statute title must always be perfect, that is, every thing, which the law deems essential to the transfer of the property of one to another, must appear on record to have been done. Whether an acquiescence for twenty years, (by a person of full age and competent to act,) in the possession of his land by another, under a title supposed to be acquired by a defective levy of an execution, will not preclude him or his heirs from taking advantage of the defect, we are not bound to determine in the present action. For although more than twenty years have elapsed since the creditor entered under his execution, yet the present demandant has arived at full age within a few years only, and was privileged during his minority not to be barred by the adverse possession of those claiming under the execution; at least, so far as that he may now vindicate his title, and question the proceedings, by which his ancestor's estate was attempted to be taken from him.

On the ground of the defect in the return of the sheriff, which

(*b*) [*Wellington* vs. *Gale*, 13 *Mass. Rep.* 483. — *Davis* vs. *Maynard*, 9 *Mass. Rep.* 242. — *Perry* vs. *Dover*, 12 *Pick.* 211. — *Allen* vs. *Thayer*, 17 *Mass. Rep.* 299. — ED.]

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has been remarked upon, we are of opinion that the levy is void, and that the demandant must recover.

Defendant defaulted.

[*31]

*ABNER WOOD *versus* THE NEW ENGLAND MARINE INSURANCE COMPANY.

Insurance was for twelve calendar months, with an agreement that, should the vessel be at sea at the expiration of that period, the risk was to be continued under the policy, at an agreed premium, until her arrival at her port of discharge. At the expiration of the year, the vessel was in a *British* port, whither she had been carried against the will of the master. A loss accuring afterwards in the further prosecution of the voyage, it was holden that, being absent on a voyage which had been commenced within the time of the original risk, the policy continued to protect the property after the expiration of the year, although not then literally at sea.

Where any loss arising from the violation of the *existing* laws or regulations of any of the belligerent powers, restricting neutral commerce, was excepted from the risks undertaken in a policy of insurance, it was holden that the underwriters were liable for a loss arising from the violation of a decree of one of the belligerents, made after the execution of the policy.

ASSUMPSIT upon a policy of insurance, underwritten by the defendants upon the brig *Sally-Ann*, on which the plaintiff declared for a total loss. The trial was had upon the general issue, before *the Chief Justice*, November term, 1815, when a verdict was returned for the plaintiff, subject to the opinion of the Court upon the following statement of facts:—

The defendants executed the policy declared upon, on the 24th of December, 1806; wherein is contained that the plaintiff caused 6000 dollars to be insured by the defendants on the said brig, valued at 8000 dollars, from *Newburyport* to every port or place to which she may proceed, (excepting the *West Indies*,) during the term of twelve calendar months, to commence on the day of departure from *Newburyport*, at noon. A part of the usual printed form was as follows: "beginning the adventure upon the said vessel as aforesaid, and to continue and endure during the voyage, and until said vessel shall be arrived and moored twenty-four hours in safety," *or until the expiration of twelve months aforesaid.* At the foot of the policy, there follows this memorandum in writing: "*Should this vessel be at sea at the expiration of the above period, the risk is to be continued until her arrival at a port of discharge. It is understood the company are not liable for any loss or expense arising from the*

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violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce."

The risk under this policy commenced on the 30th of De-
[*32] cember, 1806; and afterwards, and within twelve * months thereafter, *viz.*, on the 14th of November, 1807, the said vessel sailed from *Beverly* for *Amsterdam*, and while proceeding on said voyage, under the protection of said policy, she was, on or about the 14th of December, 1807, captured by a *British* private armed ship, under pretence that she was bound to an enemy's port. The master and all the hands, except the mate, were taken out, and the vessel ordered to *Bristol*, where she arrived on the 25th of the same December. The letter of marque, on board of which was the master of the *Sally-Ann*, arrived on the 28th. On his arrival the vessel was restored to him by the prize agents, and his papers delivered to him. The master then applied to the custom-house for a clearance to *Amsterdam;* but the collector, being doubtful of his right to clear vessels for that port, wrote to the admiralty for instructions, and in the mean time the master went himself to *London*, to consult with the plaintiff's correspondent, to procure a clearance for the vessel. He remained there about twelve hours, and on his return to *Bristol*, he found that permission had arrived there to clear the vessel for *Amsterdam*.

Immediately on his return to *Bristol*, the vessel was cleared ou , and he proceeded to sea about the 20th of January, 1808; but was obliged to put back on account of contrary winds, and returned into the outer roads for a few days, until a fair wind, when he sailed direct for the *Texel*, not having been on shore after thus putting back. On receiving his papers from the prize agents, there was an endorsement on them, warning them not to proceed to an enemy's port; against which he protested at the time. After sailing from *Bristol* for *Amsterdam*, he was boarded by an *English* frigate and a letter of marque, and permitted to proceed, after an examination of his papers.

After the vessel arrived off the *Texel*, and while about taking a pilot on board to go up to *Amsterdam*, she was captured by a French privateer, and sent into a place called *New Dieppe*. The vessel, and the cargo on board thereof, were shortly after libelled
[*33] as prize, in * the prize court at *Paris*, for having been captured and carried into *England* by a *British* cruiser, and departing thence for *Holland*, and being spoken by *British* cruisers on her voyage from *Bristol* to *Holland*. The vessel and cargo were immediately claimed by the master, and the consignees, and also by the *Dutch* government. Immediately on his arrival at *Amsterdam*, and before the vessel was injured the master applied to the captors

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to release the vessel on bond, and to deliver her without the cargo; but they refused.

After remaining a long time in *Holland* and at *Paris*, where the libel against the vessel and cargo was pending, and believing there was no chance for a successful termination to his claim, the master of the said vessel, with the approbation and aid of the consignees of the cargo, and by advice of their counsel, made a compromise with the captors, by which it was agreed that the vessel and cargo should be sold, that the captors should retain two thirds of the neat proceeds thereof, and should restore the residue to the master and consignees, and that each party should bear their own cost and expenses. The said compromise was made *bonâ fide*, and was a reasonable one; and it was for the best interest of all the parties concerned, that such compromise should be made; and it was the best that could be obtained. In making it, the vessel was not sacrificed for the benefit of the cargo; but it was as favorable for one as the other.

Neither the master, nor any of his crew, were permitted to go on board the vessel, while under detention. When the master returned from *Paris*, he found that the sails and rigging were cut and destroyed, her boats gone, and the vessel a mere wreck, of very little value, and she was sold for as much as she was worth. The cargo brought a good price at the time of the compromise. Many *American* vessels, captured under similar circumstances, were condemned; and in no case was a better compromise made than this. The said master did not know of the existence of the *Milan* decree, until after he was so captured by the *French* * privateer; although it was published in the *London* papers of the 6th of January. [*34]

The plaintiff was interested in the vessel to the amount insured; and he abandoned to the defendants his interest therein, immediately after he received notice of the said compromise; but never before, although he had seasonable information of the previous events; and he claimed a total loss, and also a general average for expenses incurred in *England*, *Holland* and *Paris*, in prosecuting his claims for the vessel, evidence of which was filed in the action.

The foregoing facts were all agreed by the parties, except that the question, whether the master knew of the existence of the *Milan* decree at the time of his sailing from *England*, was submitted to the jury, who found that he was ignorant thereof, as above stated.

The verdict, in other respects, was taken *pro formâ* only; and if the plaintiff was entitled to recover any thing, it was agreed that the Court should direct the amount for which the verdict should

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stand; or might appoint assessors, for any purpose they might think necessary or convenient.

The cause was argued at the last March term, by *Prescott* and *Hubbard* for the plaintiff, and by *Gorham* for the defendants.

For the plaintiff, it was contended that the vessel must be considered as at sea, and in the prosecution of her voyage, when she was under detention in *England*, and until her final capture by the *French* privateer, and so under the protection of the policy. (1)

The loss in this case arose from mere illegal violence. It was not pretended to have been within the *Berlin* decree; and the *Milan* decree was not within the meaning of the exception of the policy, since it was not in existence at the time it was effected. (2)

The abandonment was seasonably made, being immediately after the news of the compromise was received, by which a total loss was first ascertained to have taken place. (3)

* 35] *For the defendant*, it was said that the policy * expired on the 30th of December, 1807; that the loss occurred under the provisions of the *Milan* decree, and the defendants are excused from all loss from any of the decrees of the belligerents, which might exist during the policy. As to the seasonableness of the abandonment, *Gorham* observed, that the difference in this case between a partial and a total loss was so inconsiderable, that the point was not worth contending.

The cause stood over to this term for advisement; and now the opinion of the Court was delivered by

Parker, C. J. Several questions have presented themselves in this case, of somewhat difficult solution; but we are now ready to decide them.

The first respects the duration of the risk; whether it continued to the time when the ship was captured by the *French* privateer. At that time the year, which was contemplated as the termination of the policy, had expired. But by the terms of the policy, if the ship was at sea when the year expired, the risk was to continue until the voyage should be completed; and an additional premium by the month was to be paid, until the termination of such voyage. At the expiration of the year, the ship was not literally at sea; but was in a *British* port, whither she had been carried against the will of the master.

(1) 4 *B. & P.* 181, *Scott & Al.* vs. *Thompson.* — 2 *Johns.* 89, *Robinson* vs. *Marine Ins. Company.*

(2) 8 *Johns.* 277, *Corp* vs. *United Ins. Company.* — 7 *Johns.* 363, *Tenet* vs. *Phœnix Ins. Company.* — 6 *Johns.* 226, *Craig* vs. *United Ins. Company.*

(3) 8 *Mass. Rep.* 494, *Dorr* vs. *The Union Ins. Company.* — 11 *Mass. Rep.* 1, *Dorr* vs. *N. E. Ins. Company.* — 1 *Johns. Cases*, 313, *Earl* vs. *Shaw.* — 4 *Binney*, 445, *Brown* vs *Phœnix Ins. Company.* — 9 *East*, 294.

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Was she then, within a fair construction of the contract, within the intent of the parties, at sea? We think she was. She was absent on a voyage which had been commenced within the time of the original risk. She would have been protected, upon that voyage, to *Amsterdam* and back again; because within the common meaning of the term *at sea*, which was undoubtedly adopted by these parties. A vessel is considered in that condition, while on her voyage and pursuing the business of it, although during a part of the time she is necessarily within some port, in the prosecution of her voyage. The intention, in prolonging the risk beyond twelve months, was unquestionably to give the ship protection under the policy, in case * that time should expire, while the [*36] vessel should be employed in some unfinished voyage; and whether in a foreign port, or actually upon the high seas, we believe there was no difference in the contemplation of the parties, when the contract was made.

The policy being in operation at the time of the capture, the next question is, whether the loss happened within any peril insured against. And here we must ascertain what is the loss complained of. It is the capture by a *French* privateer, on the pretext that the ship had come from a *British* port, and had been spoken with by *British* cruisers. This certainly is within the general risks provided against in the policy; for it was an arrest and detention, and final loss, by the force and violence of subjects of the then emperor of *France*.

We must therefore consider the exception in the memorandum at the foot of the policy, and see whether, by that, the underwriters are discharged.

This exception is from any loss or expense, arising from the violation of the *existing laws or regulations* of any of the belligerent powers restricting neutral commerce. At the time of executing the policy, the *Berlin* decree of the emperor of *France* was existing; but no other decrees, either of *France* or *Great Britain*, were in force, which restricted neutral commerce. Had the vessel been captured under that decree, the underwriters would have been discharged. But upon examination of that decree, we do not find any of its provisions, which would have subjected this vessel to capture. It does not appear that she had articles of *English* growth or manufacture on board, or those of her colonies. By the terms of that decree, vessels coming from a *British* port were prohibited from entry into a port of *France* or her dependencies; but they were not thereby made liable to confiscation, unless there had been a false declaration of the master or others on board, to evade this article of the decree.

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At the time of the capture, the *Milan* decree was in force,
[*37] which subjected the ship to capture, if coming * from an *English* port, or if she had been spoken with by *British* cruisers. Now, although this vessel would probably have been taken under pretext of the *Berlin* decree, had the *Milan* decree not been passed, as the system of plunder was then in full operation, yet as another decree existed, which authorized *French* cruisers to capture vessels situated like this, we must suppose she was captured under the latter, and not under the former decree. *Causa propinqua, non remota spectatur.* And by the allegations of the libel, it appears that it was under the last-mentioned decree that the ship was claimed by the captors as prize.

This narrows the question to the point, whether the term *existing decrees*, as used by the defendants in the exception to their liability under the policy, can by fair construction comprehend the *Milan* decree. And we should willingly yield to the construction urged for the defendants, if it were consistent with the most liberal use of terms, as they are commonly used by merchants. But it must be considered that the underwriters were, in this respect, making their own bargain, and inserting their own phraseology; the object being to secure themselves, by the exception, against a risk, which in the body of the policy they had incurred.

What did they *intend* to provide against? Surely against any decrees then in force, whether known or unknown. The ingenuity of the belligerent powers, and particularly of the *French* emperor, in manufacturing decrees against neutral commerce, was not fore seen, or at least not sufficiently provided against. At any rate, it was thought enough to secure themselves against any decrees already in force. The *Berlin* decree had passed, and was probably heard of, when the policy was effected. It might have been supposed, that a retaliatory or countervailing decree would immediately be made by *Great Britain*. It was thought sufficient to provide against such decrees as were in force on the twenty-fourth day of December, 1806. Had it been designed to secure against
[*38] all such decrees * as should be made during the risk under the policy, surely more apt words would have been taken, than those made use of in their memorandum. At any rate, we cannot distort language, so as to make the term *existing* mean something which is to be made to exist afterwards.

It is thought hard that the defendants should be made liable for a loss happening from means which neither party calculated upon, when the contract was made. But it does not differ from the case of the breaking out of a war, which occasions a capture; when at the making of a policy the most profound peace existed, and there

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were no symptoms of approaching war. In such a case the underwriter loses, because he did not guard himself in the policy.

With respect to going into *England*, and thus exposing the ship to the rapacity of the *French*, under their monstrous decrees, this appears, by the statement, to have been wholly involuntary on the part of the master; and his sailing for *Amsterdam* was not a violation of duty, because he did not know of the *Milan* decree; and his permission to sail for *Amsterdam* from *Bristol* sufficiently exculpates him on account of the *British* orders in council. The *British* ports could not be considered as under blockade, by virtue of the *Berlin* decree, when there was notoriously no force there to carry it into execution; and a seizure and condemnation on that ground would have been considered a violence not justified by the law of nations. Indeed, the decree itself did not expose vessels to capture for coming from *English* ports, but only prevented their being received at *French* ports. It was therefore no breach of duty in the master to leave *Bristol* and sail for *Amsterdam*. Although, by the letter of the *Berlin* decree, his vessel might have been turned away on that account from *Amsterdam*, yet she was not made liable thereby to capture; and the master might well have supposed that, as he had been carried into the *English* port by force and constraint, the decree would not be enforced against him.

* It has been said in argument, that the ignorance of the [*39] existence of the *Milan* decree, on the part of the master, does not the less expose the owners to the loss of their insurance; because he sailed from *England* in violation of the letter of that decree.

But we see it nowhere decided, that a vessel sailing from a neutral country to a blockaded port, or a neutral vessel sailing from the blockaded port of a belligerent, the owners and master having no knowledge of the blockade, thereby becomes liable to be made prize. There may be a presumption of knowledge where a blockade actually exists, which will defeat the excuse of ignorance. But in this case there was not, nor could there be, any blockade of the *English* ports; and there was nothing from which the knowledge of the master could be inferred, of the exposure of his ship under the *Milan* decree, except that it had been published in *England*, before he sailed from thence. But this inference is rebutted by the verdict of the jury.

Upon the whole, we think the loss in this case comes within the policy, according to the fair principles of construction, and not within the memorandum, under which the defendants would shelter themselves.

The premium being stated in the policy at one per cent. per

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month during the continuance of the risk, and it being agreed that the amount of it shall be deducted from the sum adjudged to the plaintiff, it is necessary that we should decide the time for which the plaintiff is held to pay it, under the circumstances of the case; and it is our opinion that the same is recoverable, from the commencement of the risk until the time when the final compromise took place between the captors and the master.

[* 40]

* James Scholfield *versus* Shubael Bell

Of stoppage *in transitu*.

[Where goods were ordered from an *English* house by a merchant here, but before the order was executed, it was countermanded, and a bill of lading of a part of the goods was subsequently sent and received by the merchant here, and part of the goods were accordingly shipped, yet on notice thereof, after the removal of the goods, the merchant here, being insolvent, refused to receive them, and endorsed the bill of lading to a friend of the *English* house for their use, and requested him to receive the goods for them, which he could not obtain, they then being under attachment by a creditor of the merchant here; held, in replevin by the *English* house, that the property had not vested in the merchant here, and might be reclaimed by them, as *in transitu*. — Ed.]

This was an action of *replevin*, for two hogsheads of hardware The plea averred the property, when taken, to be in *William Hill*, and traversed the property in the plaintiff; and issue was joined upon the traverse.

Upon the trial of the said issue, which was had before *Parker*, C. J., at the last November term in this county, the plaintiff, to prove his property, called *William Hill* as a witness, who was sworn and examined. The articles replevied had been attached by the defendant, a deputy sheriff, as the property of said *Hill*, upon an original writ in favor of *Francis Wilby*.

The said *Hill* testified, that in the fall of 1815 he wrote to the house of *Scholfield & Co.*, in *Birmingham*, ordering a large invoice of hardware goods; and that, about twenty days afterwards, he wrote to the same house, countermanding the order. In the following spring, to his surprise, he received a bill of lading, and a letter covering that, and an invoice of the two hogsheads of hardware in question. Before this came to hand, at *Portsmouth*, in *New Hampshire*, where the witness lived and transacted his business, he received advice from the said *Wilby*, that these goods were attached at his suit. Immediately on receiving the bill of lading, &c., the

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witness not knowing there was any agent of the house of *Scholfield* in this country, went to a Mr. *March*, of *Portsmouth*, who had recommended him to *Scholfield*, and requested him to receive the goods for *Scholfield*; and to enable him so to do, he endorsed the bill of lading, and delivered over the invoice, with which *March* came to *Boston*; but could not obtain the goods, because they were held by attachment, as aforesaid. The witness afterwards, having learned that a Mr. *Lyman* was the agent of the *English* house at *New York*, wrote to him on the 16th * of May, 1816, inform- [*41] ing him of all the circumstances, and stating that he should not receive the goods. *Lyman* thereupon came on to *Boston*, and caused them to be replevied by the writ in this suit. It appeared that the house in *England* had received the countermand of the orders for goods before they were shipped; but that having procured and packed these two hogsheads, part of the quantity ordered, they concluded to send them.

It appearing to *the Chief Justice*, that there was no act of *Hill*, tending to vest the property in him, so as to make the goods liable to attachment for his debts, a verdict was directed for the plaintiff; and being so returned, the defendant moved for a new trial for a supposed misdirection.

Peabody, for the defendant. After *Hill*, the consignee, had received the bill of lading, and had exercised any act of ownership in relation to the goods in question, as he did by endorsing the bill of lading to *March*, it was too late for the consignor to stop them *in transitu*. They were, in effect, taken possession of by him; the attaching of them as his property, by a creditor of his, being equal to a voluntary assignment by him. (1)

Davis [Solicitor-General] and *Thurston* for the plaintiff.

PARKER, C. J., delivered the opinion of the Court. This case is stronger for the plaintiff than the common cases of stopping *in transitu*. In those cases, the property is supposed to vest in the consignee, but for the intervention of the consignor. When the goods are separated and removed from the possession of the consignor, upon a previous contract of sale, the absolute property vests in the consignee, and they are at his risk the moment they are set apart and designated. But for the convenience of trade, and the security of merchants, the consignor may, before they are actually delivered according to their destination, rescind the contract, and resume his property in the goods, in prejudice * of any [*42]

(1) 1 *H. Black.* 363, *Mason* vs. *Lickbarrow*. — 6 *East*, 20, S. C. *in notis*. — 1 *B. & P.* 563, *Haille* vs. *Smith*, *in error*. — 5 *Mass. Rep.* 157. — *Lane & Al.* vs. *Jackson*, 3 *P. Wil.* 185. — 3 *Caines*, 182, *Hollingsworth* vs. *Napier*. — 2 *Caines*, 30, *Hunt & Al.* vs. *Bowne*. — *Abbot on Shipping*, part 3, c. 9.

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creditor of the consignee, and even against assignees in case of bankruptcy.

But in this case, no delivery ever took place, which would create a change of property. The goods ordered were not shipped, nor sent out of the store of the consignor, to be shipped. Two casks only, parcel of the invoice ordered, are made ready in pursuance of the orders of the intended consignee. Before any act of delivery or removal takes place, the consignor receives a countermand of the order to ship. Whether he was obliged to obey this or not, as he had begun to execute the first order, is not the question. He did obey it, and consented to rescind the contract, by desisting from executing the orders. He could not rescind in part, and insist upon the execution of the residue, without the consent of *Hill*, who had ordered the goods, and afterwards countermanded the order. If he would charge *Hill* upon the strength of his first order, he should at least have gone on to execute the order in full.

Hill, by this act of shipping the two casks to him, contrary to his desire and his order, could gain no property in the merchandise, but by some subsequent act, such as receiving the goods, or by some implied assent to the consignment to him; and until they came into his possession, actually or virtually, they remained the property of the consignor.

It has been argued that receiving the bill of lading and endorsing it is equivalent to an actual receipt of the goods; and it might be, if the consignee had received it with a view to claim the goods, or had endorsed it with a view to transfer the property to another, or to enable the endorsee to obtain possession of the goods for his account. But the evidence shows that he delivered over the bill of lading, endorsed by him, with the sole view to enable *March* to receive them for the shippers; so that this act, instead of ratifying, wholly disaffirmed the consignment to him.

[*43] When the defendant took the goods as *Hill's*, *Hill* * had no property, legal or equitable, in them; and according to the principles laid down in the case of *Lane & Al.* vs. *Jackson*, any friend of *Scholfield* might claim and receive them for him. They have been replevied by an authorized agent, and the verdict, which establishes the property in him, is well founded.

Judgment on the verdict.

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NEHEMIAH W. SKILLINGS, Plaintiff in Error, *versus* CORNELIUS COOLIDGE AND ANOTHER.

A demand made by copartners, annexed to a submission to referees pursuant to Stat. 1786, c. 21, signed by one of the copartners, is a sufficient compliance with the statute.

When referees under such a submission awarded a sum certain, as due from one to the other of the parties, in full of all demands; and to such award they added certain directions, concerning merchandise belonging to the debtor, and in the hands of the creditor, that the same should be sold, and the proceeds placed to the credit of the debtor, and the balance, after deducting the sum awarded, paid over to him; this was holden not to vitiate the award.

THIS was a writ of error, brought to reverse a judgment rendered by the Circuit Court of Common Pleas in this county, March, 1813, upon a report of certain referees, appointed under the provisions of the statute of 1786, c. 21.

The demand annexed to the original submission was, "*N. W. Skillings* to *Coolidge & Oliver*, Dr. To balance due this day, as per accounts exhibited referees, 15,000 dollars," and was subscribed "*Francis J. Oliver*, for self and *Cornelius Coolidge*," and was dated the 10th of March, 1813. The submission was of the demand annexed, and of all other demands between the parties; and was in the form prescribed by the statute.

The referees reported that *Skillings* should pay to *Coolidge & Oliver* the sum of 13,000 dollars, in full of all demands between them. They then add the following, *viz.:* "It having been admitted by the parties, that *Cornelius Coolidge* and *Francis J. Oliver* have in their hands, and under their control, sundry articles of merchandise, the property of the said *N. W. Skillings*, lodged with them as security for advances made to him, as follows, *viz.:* Coffee shipped per the brig *William* to the north of *Europe;* spices ditto, per brig *Cornelius;* beef per brig *Despatch;* also one bale of sponges, and a quantity camel's hair; *— Now we do award [*44] that the said merchandise shall be sold as soon as may be, the net proceeds of which to be placed to the credit of the said *N. W. Skillings*, free from any charge or expense, other than the said *Coolidge & Oliver* are obliged to pay; and after deducting from the amount received from the sale of the afore-mentioned merchandise the sum of 13,000 dollars, with interest, the balance, if any, to be paid the said *Skillings* on demand."

The report was accepted by the Common Pleas, and judgment rendered for the sum of 13,000 dollars and costs.

The errors assigned were as follows: —

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1. That the demand was not assigned by said *Coolidge & Oliver* as by law it ought to have been.

2. That the only demand made by said *C. & O.* against said *S.* was made on the 10th of March, 1813, of a balance of accounts exhibited to referees, at which time there had been no exhibition of accounts to referees, nor had the referees at that time been appointed.

3. That the referees took into consideration divers matters and things, which were not submitted to them; and did order and direct the disposal, sale, and account, of divers merchandise in their report mentioned, which merchandise was not included in the demand annexed to the rule.

4. That the referees had no power, in and by said rule of reference, to order the sale of any merchandise, belonging to either of the parties to the rule.

5. That the award is conditional, uncertain, and cannot in law be the foundation of any judgment against the said *Skillings*.

6. That the referees had not power to do any act other than to ascertain the balance which might be due, if any, in money from said *Skillings* to said *Coolidge & Oliver*, and to make return thereof, to the end that judgment might be rendered and executed accordingly; but that the said referees did order the satisfaction of
[*45] the debt they supposed due, by the sale of * merchandise, which was not within the power and authority given them.

7. The general error.

The cause was briefly argued at the last March term, by *Amory*, *Sullivan*, and *Guild*, for the plaintiff in error; and by *Prescott* and *Hubbard*, for the defendants in error; and now the opinion of the court † was delivered by

PARKER, C. J. The first error assigned in this case is, that the demand, upon which the submission to referees was made, was not signed by the parties demanding against the plaintiff in error. The said *Coolidge & Oliver* were partners in trade, and a signing by one, of any contract touching the partnership concerns, not under seal, would bind both. This may be considered, therefore, a signing by both, if that were necessary to give validity to the submission. But the signing by one only of two partners, as he would have authority to submit for both, we think would sufficiently comply with the statute. (*a*)

† *Jackson*, J., having been of counsel in the original suit, did not sit at the argument or decision upon this writ of error.

(*a*) [According to the authorities, one partner has not authority to bind his copartners by a submission, even of matters arising out of the common business. — *Stead* vs. *Salt*, 3 *Bing.* 101—500. — 4 *J. B. Moore*, 340. — *Strangford* vs. *Green*, 2 *Mod.* 228. — *Mudy* vs. *Osain*, *Litt. Rep.* 30. — *Lumsden* vs. *Gordon*, *Stark.* 195. — *Morr.* 14567

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The next error assigned is, that the demand annexed to the submission is not sufficiently particular to authorize the justice to take the acknowledgment of the parties, and to give jurisdiction to the referees. The statute, in requiring a particular demand, can intend nothing more than that a cause of action shall appear to exist, in order that a frivolous claim, or one which would be manifestly absurd, might not be the ground of the proceedings. In the case of *Jones, in error,* vs. *Hacker,* (1) which was cited to support this objection to the proceedings, the demand was for 250 dollars, with out stating for what it was due; and for aught appearing upon the demand itself, it might have been made for some ridiculous, if not illegal, purpose. In the opinion given by the court, it was stated that the demand need not be as particular as a declaration; but that it must show the cause for which the money was
*demanded. In the case at bar, the sum demanded is [*46]
stated to be for the balance of accounts exhibited to the referees; meaning, as both parties have admitted, *to be* exhibited to them. We think this sufficiently particular; as we should if the demand had been for a sum of money for a note of hand, or bond, to be exhibited; which we think would not be objectionable.

The other errors assigned all refer to a supposed irregularity in the report of the referees; and may be considered together, without prejudice to the several objections taken by the plaintiff in error.

The referees, after determining that the sum of 13,000 dollars is due to *Coolidge & Oliver,* and awarding that the same shall be paid to them by *Skillings,* which would have been the proper termination of their report, proceed to consider the state of certain property belonging to *Skillings,* which had been lodged by him with *Coolidge & Oliver,* as security for advances made him by them, all of which was under their control, but beyond sea, in a foreign country. They award that this property shall be sold by *Coolidge & Oliver,* without expense to *Skillings,* and that he should be credited with the proceeds, and that the balance, deducting 13,000 dollars, should be paid over to *Skillings.*

It is contended that this part of the award is void for uncertainty; because it does not describe or specify the property so held, and because no means are provided by the referees, or by the law, by which this intention of the referees may be carried into effect.

But it is not necessary to consider the provision respecting the

Antram vs *Chase,* 15 *East,* 209. — *Gow. Partn.* 66. — *Coll.* 239—261. — 2 *Chitty's Prac.* 77. — *Com. Dig. Abr.* D. 2. — 2 *Bell's Com.* 618, 5th ed. — *Adams* vs. *Bankart,* 1 *Crompt. Mees. & Ros.* 681. — *Karthaus* vs. *Farrar,* 1 *Peter's Rep.* 222, 228. — *Buchanan* vs. *Curry,* 19 *Johns.* 137. — 3 *Kent.* p. 49, 4th ed. — *Story on Part.* 169. — ED.]

(1) 5 *Mass. Rep.* 264.

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property of *Skillings*, as a part of the report of the referees. The object of their jurisdiction was to ascertain the balance of the accounts between the parties. They were under no necessity of adjudicating upon the property of *Skillings*, which he had pledged, to secure the advances made to him by the defendants in error. If it was so pledged, as appears by the admission of the parties, *Skillings* could have made no demand against them for it, or
[*47] for the proceeds, * while the balance of accounts remained against him; and the referees could not lawfully have set it off against the demands of the defendants in error; their report would for that cause have been bad.

It is proper, therefore, to consider every thing stated in the report touching this subject, as cautionary on the part of the referees to prevent the inference, which might have been drawn from the submission of all demands, that the property in the hands of the defendants in error had become theirs. This was intended for the security and benefit of *Skillings*, lest he might possibly be concluded by the report from reclaiming this property, when it should have answered its purpose of securing the sum he owed. Specifications of this sort are not unusual, and are often necessary to prevent disputes, which might arise in consequence of the general form of submission, and the effect of a report on all demands between the parties. We do not consider that the right of *Skillings* in the property pledged is settled, or in any manner affected, by the report of the referees; nor that it was necessary for them to specify the amount of that property, or give any particular description of it His right is altogether independent of that report; and he is, without doubt, in possession of evidence sufficient to enable him to establish his claim to the whole, whenever he shall be entitled, by payment of his debt, to reclaim it; or to the surplus of proceeds, whenever by the sales the defendants in error shall have received enough to satisfy their claims.

If any doubt exists of the validity of the report, it results from the manifest intention of the referees, that the defendants in error should not coerce payment of the sum awarded to them, but that they should dispose of the property committed to them in pledge, and pass the proceeds to the credit of *Skillings* on account of the balance found due from him. It may have been perfectly equitable that he should have this indulgence; for the relations between the parties may have been such, as to render it unjust that
[*48] his other property or * his person should be exposed for this debt, until the termination of the adventures upon the property which his creditors received in pledge; and we are to believe that justifiable motives induced the referees to make the

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provision for the benefit of *Skillings*. If, therefore, an execution of the judgment was necessary to give complete effect to it, we should apprehend that the judgment ought to be avoided, because of the prejudice to *Skillings*, contrary to the intention of the referees.

But the statute does not require that an execution should issue, and it would have been perfectly proper in the court, which rendered the judgment, to have inhibited an execution, until a special order therefor. For this is not one of those civil actions, in which the party recovering judgment is entitled to his execution, at all events, within twenty-four hours after judgment. In the case of *The Commonwealth* vs. *The Pejepscut Proprietors*, (2) it is stated by Judge *Sedgwick*, that if the referees make a conditional report, or provide that the sum they find due shall be paid at a future day, no execution will issue; but that an action of debt on the judgment will lie, when the time of payment has arrived, or, perhaps, an attachment to compel a performance of the report or award.

It is true, that nothing appears upon this record, by which the judgment creditors would be prevented from suing out their execution; but if they do it contrary to the manifest intent of the referees, a remedy may be had by *audita querela*.

If it should happen that the proceeds of the property, under the control of the defendants in error, should be insufficient to satisfy them for the amount of their judgment, they may have their action of debt thereon; and the plaintiff in error will be entitled, under a plea of payment, to avail himself of whatever sums they may have received from his property.

Upon the whole, we see no cause for reversing the judgment, as no formal or substantial error exists, and as the rights of the parties are entirely protected by * the doings of the [*49] referees, on which the judgment is founded.

Judgment affirmed.

(2) 7 *Mass Rep.* 399.

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PETER GAYETTY *versus* GEORGE BETHUNE.

Of the right of way over the land of another by prescription. (1) [Sixty years, adverse possession is necessary. If the owner of two adjoining estates permit an easement for the use of one in the other, the time of enjoyment, under this permission, cannot be added to subsequent adverse possession of an after owner of the estate, enjoying the easement to make up the requisite time for a prescription. A way of necessity exists only where there is no other way into a public street. - - ED.]

THIS was an action of the case, for disturbing the plaintiff in the enjoyment of a way; and it was referred to the determination of the Court upon the following facts, stated and agreed by the parties: —

In the year 1723, *Catharine Winthrop* was seised in fee of a certain messuage in *Boston*, bounded easterly on *Cornhill Square*, there measuring forty-six feet, and extending westerly to land belonging to the county; and in that year she conveyed the same, with the appurtenances, to one *Henry Deering*, who owned the adjoining tenement. The whole front line of the land so conveyed was then covered by a brick dwelling-house now standing, through the southerly end of which is a four feet passage leading from *Cornhill Square* into the yard of said messuage, said passage having a gate or door at each end.

In the year 1765, said *Deering* sold and conveyed to one *Charles W. Apthorp* the messuage and land aforesaid, and by the same deed also conveyed said other tenement adjoining that before described southerly, and bounded on *Cornhill Square* easterly thirty-nine feet. This latter tenement consisted of a dwelling-house erected on the north line of the lot, and extending in depth one hundred and fifty feet, leaving a yard on the south side of the dwelling-house, twenty feet in width, and extending from *Cornhill Square* to the county land, which dwelling-house is now standing.

In the year 1767, both the aforesaid messuages were sold [*50] and conveyed by said *Apthorp* to *G. Bethune*, * Esq., father of the defendant, who died, seised of both the said tenements, in the year 1785, and partition of whose estate was made among his heirs in 1801, by commissioners, under an order of court, pursuant to statute.

(1) See *Commonwealth* vs. *Inhabitants of Newberry*, 2 *Pick. Rep.* 51. — *Inhabitants of the First Parish of Gloucester* vs. *Beach*, *Ibid*, 60, *note*. *Hill* vs. *Crosby*, *Ibid.* 166 — *Russell* vs. *Jackson*, *Ibid.* 574.

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From the time of said *Bethune's* death until the said partition, *Thomas English*, as agent for the heirs of *Bethune*, leased both tenements from year to year, and in the leases of the said northern tenement, specially granted permission to carry wood and hay, and to pass with carriages, over said southern tenement, through a gate in the fence, which separates the two tenements; and made a corresponding reservation in the leases of the southern tenement.

In the partition aforesaid, the said southern tenement was set off to said *English* and his wife, in her right, with all the privileges and appurtenances to the same belonging; and the same has been conveyed by said *English* and his wife to the defendant. In the same partition, the said northern tenement was set off to the heirs of *Edmund Dunkin*, and about six years ago was conveyed to the plaintiff.

For more than thirty years preceding the 9th of February, 1816, the successive tenants of the tenement now owned by the plaintiff have passed and repassed continually, with carriages and carts, whenever it suited their convenience, from *Cornhill Square* to and from the messuage now owned by the plaintiff, through the yard of the messuage now owned by the defendant; and there is an ancient gate, in the partition fence between the two estates, the fastenings to which are on his side of the fence.

There was an ancient building on the plaintiff's estate, formerly occupied as a barn, but probably not originally constructed for a barn, which fell down from age and decay about sixteen years before the commencement of this action.

The plaintiff, before he purchased his said estate, had a lease thereof, for three years from the 6th of June, 1808, from *Edmund Dunkin*, in which lease were the * words, "with [* 51] the privilege of a passage way through the yard of the house adjoining south of said premises, for wood, hay, and wheel-carriages, to pass to and from said house and yard."

The plaintiff purchased his said estate, at auction, of the heirs of *Edmund Dunkin*; and at the sale the auctioneer stated to the persons present, that the estate would be sold with the privilege of a cart or carriage-way through the yard of the south estate; but the defendant was not present at the sale, nor did he know of the sale.

None of the ancient deeds mentioned the right of passage, nor does the deed given to the plaintiff; but they all contain the usual expression of all privileges and appurtenances; and in those of *Deering* to *Apthorp*, and of *Apthorp* to *Bethune*, there is granted the following privilege — "also the free and uninterrupted liberty, use, and privilege, of the well and pump standing in the passage-

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way, that is, between the hereby granted premises and the brick church." †

In the partition aforesaid, no mention is made of such right of way over said southern tenement, though a similar one is expressly granted to one of the heirs over land in *Cambridge*, assigned to another of them.

There is no carriage-way into the yard of the plaintiff, [*52] but through the defendant's yard. On the 9th of * February, 1816, the defendant shut up the way through his yard, and forbade the plaintiff to use it any longer.

If, upon these facts, the Court should be of opinion that the plaintiff had the right of way which he claimed, the defendant was to be defaulted; otherwise the plaintiff was to become nonsuit.

W. Sullivan, for the plaintiff, argued that the facts showed either, 1. A prescriptive right of way, which, although extinguished by the unity of possession, was revived upon the separation of the estates, the use having been uninterrupted. (1)

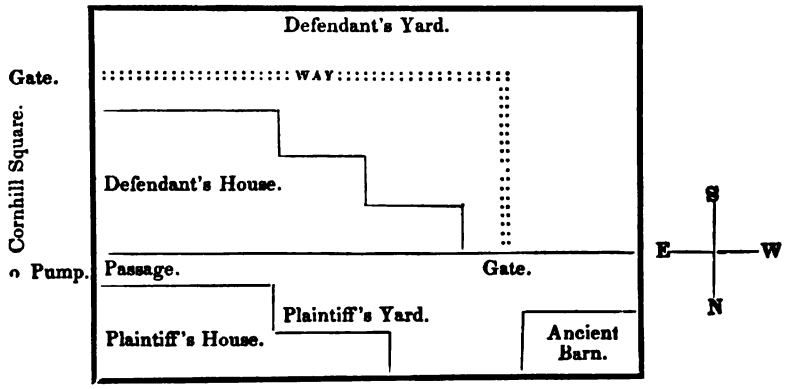
Or, 2. It was a way by grant. A grant of appurtenances will pass a right of way. (2)

Or, 3. It was a way of necessity, and so not extinguished by unity of possession. (3)

Amory for the defendant.

PARKER, C. J., delivered the opinion of the Court. The plaintiff in this action demands damages against the defendant, for an alleged

† Sketch of the Premises.



(1) 1 *B. & P.* 371, *Whalley* vs. *Thompson*.
(2) 1 *B. & P.* 400, *Holcroft* vs. *Heel*. — *Bull. N. P.* 74. — 3 *East*, 294, *Campbell* vs *Wilson*. — 1 *Taunt. Rep.* 279, *Ballard* vs. *Dyson*. — *Plowd.* 170. — *Cro. Jac.* 190. — 11 *East*, 374, *Daniel* vs. *North*.
(3) *Cro. Jac.* 170, 190. — *Noy*, 84. — 6 *Mod.* 3. — 2 *Lutw.* 1487. — 2 *Sid.* 111. — 5 *Taunt.* 311. — 8 *D. & E.* 50, *Howton* vs. *Frearson*.

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wrong in interrupting him in the use of a way or passage from land in the rear of a certain tenement, of which he is seised in fee, over land adjoining, which belongs to the defendant, into the square sometimes called *Church Square*, and sometimes *Cornhill Square*, which is in the rear of the block of buildings standing upon the former site of the old brick meeting-house.

His counsel would derive his right to the easement claimed, by showing from the facts agreed, that he acquired it by prescription, or by so long a use as raises a presumption of a grant, or by operation of law, as a way of necessity; and he expects to prevail upon one or other of these grounds.

With respect to a prescriptive right, as those terms are commonly used, that is, an adverse claim and exercise of the right for sixty years, there can be no pretence of succeeding upon this ground. For the plaintiff's title to the estate, to which the easement is supposed to be appurtenant, did not commence until about six years before the commencement of the action; and *be- [*53] fore that period he had held the same estate under a lease from year to year, for three years, which was the first connection he ever had with the estate. Nor can he avail himself of any antecedent use of the easement by his grantor, sufficient to support a prescriptive title; for he did not become proprietor until the year 1801, less than twenty years ago. Previously to that period, as far back as the year 1723, both the estates were owned by one and the same person, *Deering* being the proprietor in that year, *Apthorp* from the year 1765 to the year 1767, and from that time *Bethune*, until his death in the year 1785. During all this time, no such right, as is contended for, could have existed. For it is impossible for a man to have an easement or right of way in his own estate. A passage *de facto* may have been used by the occupants of the northern house, over the land belonging to the southern tenement; but this must always necessarily have been by permission of the proprietor of both estates; and no one, who afterwards became proprietor of the estate, to which the passage is supposed to be appurtenant, could set up a right growing out of such permission.

Prescription, in the ancient sense of the word, is founded upon the supposition of a grant; and therefore it is, that the use or possession, on which it is founded, must be adverse, or of a nature to indicate that it is claimed as a right, and not the effect of indulgence, or of any compact, short of a grant. The death of *George Bethune*, the elder, having happened but thirty-two years since, the title by prescription must wholly fail.

Then it is said, that the easement was created by grant, and that the assignment by the commissioners under the statute must be

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considered as a grant to *Dunkin* and his wife, who was the daughter and one of the heirs of *Bethune*.

This cannot be inferred from the words of the assignment. The northerly tenement is set off, by metes and bounds, to *Dunkin's* wife; and no easement is given, unless by the general [*54] terms "all the privileges * and appurtenances thereto belonging." Nor is there any exception or reservation in the assignment of the southerly tenement to *English* and his wife, another daughter of *Bethune*, to whom that estate was set off without any encumbrance whatever. Admitting that the words "privileges and appurtenances" are sufficient to pass a right of way in actual existence, which the authorities seem to indicate, yet such words will not create a new easement; and it has been observed, that none such existed at the time these estates were divided. Nor is it necessary to give these words so extensive a meaning, in order that they may have some operation; for the privilege of using a pump or well was appertaining to both these estates when created, and it was proper, if not necessary, for the commissioners, by some general words, to secure the continued use of it to each, after the division should take place.

If the words had been *with all ways therewith used*, or *heretofore used*, the evidence of the actual use of this way, before or at the time of making the partition, would have been material, and perhaps decisive, to show that the way now contended for ought to pass appurtenant to *Dunkin's* estate.

The fact that *English*, when agent of both estates, in leasing the northern house, gave this right, and reserved it in the lease of the southern house, proves only that he chose to accommodate his tenants, but created no right adverse to the owners of the southern house; and the fact, that *Dunkin* made the same provision, has no greater bearing upon the question. But the necessity of providing for it by lease, and the omission of granting it by the deed, when *Dunkin* conveyed to the plaintiff, is very strong proof that the easement was not supposed to exist by law, in the proprietor or tenant of the northern house.

But it has been argued, that the possession and use of this privilege has been such as to furnish presumption of a grant. If this were so, that presumption must be judged of by the jury, [*55] and not by the Court. * We apprehend, however, if the cause were before a jury, there is not evidence in the case from which a grant could be presumed. No time, before the division of the estate among the heirs, could be taken into view for the purpose; because, as has been before observed, there could not have been, before that time, any adverse possession, the whole being

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in *Bethune*, or his grantors. And it is *adverse possession* only, upon which a presumption of a grant can arise, or a possession claimed or used as a rightful possession. Since that period, sufficient time has not elapsed to justify the presumption of a grant from *English* and his wife. No period short of twenty years has been allowed sufficient for this purpose in this country; nor has it been definitely settled, that any shorter period will suffice in *England*. Perhaps, by analogy to the time when the right of entry is taken away from one having a right of possession, the term of twenty years has been established as the proper period, to found a presumption of this kind upon. There seems, at least, to be no good reason for diminishing the time; and to admit of it in all cases, when only a few years' use of another's land has been enjoyed, would be likely to defeat the provisions of the statute, which requires that all rights and interests in lands and tenements shall pass only by deed or writing. (4)

The third point insisted on for the plaintiff is, that a way exists of *necessity* over the ground of the defendant, from the rear of the premises belonging to the plaintiff.

But this is by no means tenable. This right depending upon necessity, exists only where the person claiming it has no other means of passing from his estate into the public street or road. In the case before us, there is an avenue, and one which was provided when the house was built, leading from the street to the land in the rear of the house; besides which, the house abuts on the street or square; so that the plaintiff may open a passage, if he has not one already. A right like this is to be construed strictly. In the case of * *Pernam* vs. *Weed*, (5) the plaintiff had no [*56] other way to get from his land to the public street; and the front land had been taken from him *invito* by his creditor. In other cases, when a man has granted land surrounded by land of his own, which he retains, he is supposed tacitly to have granted a right of way, upon the well-known principle, that when a man grants any thing, he is held to have granted every thing necessary to the use and enjoyment of the thing granted. It may well be doubted whether, if a man voluntarily take a conveyance of land, which is surrounded on all sides by land of his grantor and others, he can enforce this right of way, under a plea of necessity, against any one but him who conveyed to him. Now, in the case at bar, the plaintiff must be held to have voluntarily purchased, knowing the situation of the estate; and if he had no access to the back part of it, but over the land of another, it was his own folly; and he

(4) *Stat.* 1783, c. 37. (5) 2 *Mass. Rep.* 203

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should not burden another with a way over his land, for his convenience.

The idea of necessity in this case seems to be referred altogether to the ancient barn, which formerly stood upon the land, now owned by the plaintiff, in the rear of the house. But that barn has not been standing for sixteen years, and there is no reason to suppose that it had been used as such within the last thirty years. Now, if it could be maintained that a barn was necessary within a town or city, still the plaintiff cannot be supposed to have purchased with a view to the enjoyment of one which had disappeared long before he purchased; and he cannot now found a claim upon a necessity, which arises from a desire to erect a new barn upon the same site.

We think the plaintiff not entitled to recover upon either of the grounds, upon which his counsel has endeavored to support his action. According to his agreement, therefore, he must be called.

Plaintiff nonsuit.

[* 57]

* JOHN KENDRICK *versus* PHILIP WENTWORTH.

Where a judgment creditor has extended his execution upon land not belonging to the judgment debtor, he may not sue out a *scire facias*, under the Stat. 1785, c. 6, without a previous application to the court from whence the execution issued.

THIS was a *scire facias*, brought to obtain an *alias* execution upon a judgment heretofore recovered by the plaintiff against the defendant, upon a suggestion that the original execution had been levied upon real estate, which did not belong to the debtor; pursuant to the provisions of the statute of 1785, c. 6.

There were several pleas to the *scire facias*, which resulted in demurrers. When the cause came on for argument upon the demurrers, it was suggested by the defendant's counsel, that the writ had been sued out by the plaintiff, without application to the Court, and that the defendant had some equitable ground, which he could have addressed to the discretion of the Court, had such application been made. — And upon consideration it was decided *by the Court* that a *scire facias* under this statute was not a writ of right, which the party may take from the clerk's office at his pleasure; but he must first make application to the Court as the statute has prescribed; and the Court will, if they see cause, order notice to the judgment debtor, before the writ shall issue; or they will refuse the

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writ, if it does not appear that substantial justice requires that it should issue.

The writ was dismissed, as having issued improvidently.

T. Williams for the plaintiff.

Prescott and *Aylwin* for the defendant.

[*58]

*OLIVER C. WYMAN *versus* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE HALLOWELL AND AUGUSTA BANK.

A banking company being incorporated by the same name with a former one, and having appointed the same president and cashier, received and issued the notes of the former company, the officers of the new company frequently declaring that there was no difference between these notes and those issued by the new company: it was holden that the new company were not thereby liable for the notes of the former company. (1)

THE plaintiff declared in *assumpsit*, "for that the said corporation at *Boston*, on the 1st of January, 1814, by sundry promissory notes or bank bills, made in the name of the said corporation, and subscribed by *Benjamin J. Porter*, their president, among other things, for value received, promised sundry persons to pay them, or bearer, sundry sums of money, a schedule whereof is hereto annexed, amounting in the whole to the sum of 2000 dollars; and the said corporation, by their officers and agents, did issue and put the said bills in circulation, and the same bills afterwards lawfully came to the hands and possession of the plaintiff, who thereby became, and still continues to be, the lawful bearer thereof, and being so possessed of said bills, afterwards, on the 8th of July, 1815, demanded payment of said bills at the office of said bank in said *Hallowell*, at the usual hours of business, of the cashier of said corporation, who then and there wholly refused to pay the same; whereby the said corporation became liable, and in consideration thereof then and there promised the plaintiff, to pay him the amount of said bills: yet, though requested," &c.

The action came on for trial upon the general issue, at the last November term, before *Parker*, C. J., when the plaintiff, in support of his declaration, offered in evidence sundry bills or notes of the *Hallowell and Augusta Bank*, which bore date prior to June, 1812,

(1) *Salem Bank* vs. *Gloucester Bank*, 17 *Mass. Rep.* 29.

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and were signed by *Benj. J. Porter*, as president, and *Jeremiah Dummer*, as cashier, and payment of which had been de-
[* 59] manded and refused at the banking-house of * the defendants. As the corporation, which was made defendant in the present action, was created by a statute, which passed on the 23d day of said June, and was not in existence at the time the notes produced appeared on the face of them to have been issued; and as, at the times of their respective dates, there existed another corporation with the same name, created by a statute which passed on the 6th of March, 1804, and having for its president and cashier the persons whose names appeared in those capacities on the notes offered in evidence; and it being admitted that there was no evidence that the notes produced were, in fact, issued by the bank last incorporated, the notes so offered were rejected by the judge.

Sundry depositions were then read, tending to prove that the new corporation had received and passed, or issued, bills of the old corporation, paying them out on checks and loans; that the cashier and some of the directors of the new corporation had frequently declared that there was no distinction between the notes which were issued before, and those which were issued after, the incorporation of the new bank; and that it was upon the faith of those declarations, and of the conduct and transactions of the new corporation, that many notes of the old bank, and probably those of which payment was demanded in this action, were current and received as good.

The judge, being of opinion that nothing short of proof that the notes sued, or some of them, were issued by the new bank, as their own notes, and with an intent to have them considered as evidence of promises on their part, would entitle the plaintiff to recover, directed a nonsuit, without hearing any evidence on the part of the defendants.

If the whole Court should be of opinion that the jury might legally have inferred from the evidence in the case, that the notes so offered in evidence were issued by the defendants after their incorporation, and that upon such fact being found, or upon other facts proved by the evidence aforesaid, the plaintiff would be entitled
[* 60] * to recover on any declaration in *assumpsit*, the nonsuit was to be set aside, and the cause to proceed to trial.

The cause was argued by *Prescott* and *Bigelow* for the plaintiff, and *Sullivan* and *Gorham* for the defendants.

For the plaintiff, it was contended that the defendants had, by their acts in re-issuing the notes of the old corporation, adopted their promises; that the delivery of a contract does, in effect, constitute its date; that these notes, having been paid out by the

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present corporation, promiscuously with their own, they were to be considered as good evidence of a promise by the defendants, as if they had never been issued by the old corporation. The plaintiff furnished the best evidence the nature of the case admitted, that these notes had been re-issued by the new corporation; especially as the old bank had ceased to transact any business whatever for more than two years previous to the plaintiff's presenting these notes for payment.

The defendants voluntarily assumed the name of the former corporation, and they elected the same officers, who repeatedly declared that the old notes were as binding on the new as on the old corporation. They issued the old bills as their own, and received them in payment in the same manner. They pursued this course for two years. Surely, upon these facts, the jury would have a right to consider these notes as evidence of an undertaking on the part of the new corporation to pay all the notes of the old one.

For the defendants, it was said that they had received and paid out the notes of the old corporation, as they did those of all other banks in general credit. There was no evidence, nor any ground of presumption, that the individual notes in the plaintiff's possession were ever received and issued by the defendants. Then, if they were held liable for these, they must be equally so for all the notes issued by the old bank. The opinions and declarations of the officers could have no effect to bind the corporation. They were intrusted * with certain powers, and while [* 61] within their legitimate authority, their acts and undertakings were binding upon their constituents; but beyond that they could have no such effect.

PARKER, C. J., delivered the opinion of the Court. This case is to be considered without reference to any particular form of action, so that if a declaration in *assumpsit* could be formed, which could be supported by the evidence offered by the plaintiff at the trial, giving it its utmost weight, and without regard to any evidence of a contrary tendency, which the defendants might be in possession of, a new trial is to be had, with leave to form a declaration accordingly.

We have considered the case in this liberal and extensive view, and are satisfied that no action can be maintained against the present defendants, upon the notes which were offered at the trial, without proof that they were issued by the new corporation, as their own notes, and with a view to adopt them as such, instead of issuing notes of their own. Indeed, we are not clear that, with such proof, the defendants would be answerable, unless it were likewise

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proved that the company, by some vote or other legal act, had authorized the directors or officers of the corporation to bind them in this unusual way. Such a state of facts, without the last-mentioned evidence, would prove that the officers, who had so undertaken to pledge the credit of the bank, had acted unwarrantably, and wholly beyond the authority resulting from their trusts and offices; and in so doing they could not implicate the stockholders or company, who are supposed to rely upon the faithful and correct discharge of duty by their agents and servants.

The numerous stockholders in a bank, scattered as they often are over all parts of the commonwealth, would be in an extremely unsafe situation, if their property was bound by the irregular transactions, or by the declarations or confessions, of their officers, beyond the legal sphere of their action. It is true that it is not [* 62] required that corporations should act altogether by * seal; but their powers and their liabilities are still limited by the usual principles of such institutions, and their officers are restricted to such modes of binding the company as result from the nature of their duty, and the powers vested in them by their offices.

The two banks, which have the same name, are necessarily two distinct corporate persons, both having legal existence together, but neither being answerable for the notes, promises, or obligations, of the other. They, unfortunately, had the same persons for president and cashier — a circumstance which has caused much confusion, and no little mischief. The one last incorporated could, however, be under no obligation to pay the debts of the other, unless by some corporate act they had adopted such debts. The confessions of their officers, or any conversation of theirs, tending to create a belief, that the bills of the old bank would be paid by the new, could not be admitted as evidence against the corporation.

There may have been great fraud practised by the persons who had the management of the affairs of these banks, mixed up, as they were, with the same officers, and a confusion of property. But fraud cannot be imputed to the company. It is individuals alone, who by their conduct have led people into a belief, that the new bank was responsible for the notes of the old; and it is these individuals who are liable civilly to the party injured by their conduct; or criminally, if, with a fraudulent view, and with purposes of speculation for their own profit, they have done any thing which amounts to a cheat upon the public.

The ground upon which the counsel for the plaintiff suppose that the action can be maintained, is by showing that the notes which are sued in this action, were in fact issued by the new bank *as their*

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own notes, and with a view to have them considered as evidence of their own promises. If this were made out by suitable evidence, the case might require more consideration; but even then, the question would arise, whether the officers of the bank could thus bind the company, unless * some authority, ex- [*63] press or implied, was proved to have been given to the directors or officers, who adopted so unusual a mode of transacting business.

But if such facts were proved, they must be made to apply to the notes upon which the company should be sued; for it would be inadmissible that the new bank should be responsible for all the notes of the old company, because they had adopted and passed some of them as their own. Yet this is the legal inference, acknowledged to result from a decision in favor of this action, upon the evidence which is offered; nothing further being expected to be proved, than a presumption that these notes were issued because other notes had been. And thus the new bank would be made responsible for the whole amount of the outstanding debts of the old, whether in the hands of the original receivers, or of speculators who may have purchased them for a trifle in the discredited state in which they have been for a long time placed. This would certainly be unjust, and would be carrying the principle of liability for the conduct of agents to an extent never before thought of.

It has been urged in argument, that the principles which are applied to contracts made by agents for another, upon an authority implied from former employment of the same agent for similar purposes, would be justly applicable to the defendants in the case before us. But there is a material difference. The individual stockholder commits no authority to its officers, but that which is given by the charter of incorporation, and by a vote of a major part in interest of the individuals acting in a corporate form. No sanction of any act, beyond the authority so derived, can be implied by the repetition of such act. For the company as such, or the individuals composing it, might not, and generally would not, know of any transactions of this singular nature. They may reasonably trust that the duty of each will be faithfully performed.

But the principle contended for, will carry the doctrine even beyond that which has been applied, in some * in- [*64] stances, to the cases of masters and servants, or principals and agents, in mercantile concerns. The whole of that doctrine is, that when the principal appears to have given unlimited authority to an agent to contract for him, by signing his name to bills of exchange, promissory notes, or other commercial paper, he shall not be permitted to deny such authority in any particular contract

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which appears to have been taken on the faith of authority so given; but the authority shall be implied. In such cases, however, the identical contract, which is attempted to be enforced against the principal, must be proved to have been made by the agent for the principal. But in the case at bar, the utmost that the evidence offered could prove is, that *other notes* had been taken and issued by the bank which is sued in this action; and whether the notes now sued ever were so issued, would still rest in conjecture, or at most but slight presumption; unless it could be proved that all the notes of the old bank had passed through the new in this manner, which has not been supposed in the argument.

Upon the whole, nothing appears in this case, but that these banks were unfortunately and imprudently managed, originally, it may be presumed, without any view to mischief; and that the new bank received in payment, and paid away, the notes of the old, in the same manner this and other banks did, with all bank notes, which were called current; with this only difference, that the officers in the new bank, either from too great confidence in the old, or for sinister purposes of their own, upheld the credit of the notes by endeavoring to connect them with the new institution; a conduct for which they may be personally liable, but which ought not and cannot prejudice the company, whose interests and character they abused. (*a*)

Motion to set aside the nonsuit overruled.

(*a*) [*Salem Bank* vs. *Gloucester Bank*, 17 *Mass. Rep.* 1. — *Foster* vs. *Essex Bank*, 17 *Mass. Rep.* 479. — *White* vs. *Westport C. & M. Co.*, 1 *Pick.* 215. — *Prop. Canal Bridge* vs. *Gordon*, 1 *Pick.* 297.

[* 65]

* COMMONWEALTH *versus* SAMUEL DANA

The remission of the penalties of recognizances, provided by the Stat. 1810, c. 80, was intended to apply only to cases of irresistible necessity or unavoidable accident, and for the relief of unfortunate sureties.

DEBT upon a recognizance, in which the defendant was surety for the appearance of one *Lathrop*, an inhabitant of *Vermont*, indicted for a misdemeanor.

After the defendant had been defaulted, *Shaw* moved the Court to remit the whole or part of the penalty of the recognizance, under the provisions of the statute of 1810, c. 80. In support of the

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motion, he stated that the father of *Lathrop*, the principal, had secured an indemnity to the defendant for all costs and damages he might incur as such surety for his son. *Shaw* then read several depositions, showing that the father was in very moderate circumstances, and of slender constitution, having a family dependent upon him, and that the payment of this recognizance would greatly embarrass him; showing also, that the principal had been well educated, and except in the act for which he was here indicted, had been correct in his conduct and habits; and that since that particular act he has constantly resided in the house of his father in *Vermont*.

The Court said the statute was plainly intended for cases of unavoidable accident, or irresistible necessity, and for the relief of unfortunate persons who are induced by humane feelings to become sureties for persons who afterwards abscond, leaving their bail without indemnity or remedy. In the present case, the principal is quietly in the house of his father, who may be considered as the only party interested in this application to the discretion of the Court. It is in his power to produce him, and subject him to the proper animadversion of the law upon his offence. It would be a gross misapplication of the power given by the statute, to apply it to a case thus circumstanced. The defendant can take nothing by his motion.

J. T. Austin for the commonwealth.

[*66]

*PEARL SPAFFORD AND OTHERS *versus* WILLIAM DODGE AND ANOTHER.

A vessel was chartered for a voyage at a certain hire by the month, so long as she should be continued in the service of the hirers, who were to victual and man the vessel and pay all port charges. In the passage home she was captured as prize, and detained several months, but was finally restored, and arrived at her port of destination. The owners were entitled to the hire, as stipulated by the charter-party, without any deduction for the time of the detention in consequence of the capture.

The costs and charges paid by the hirer, in procuring the restoration of the vessel and cargo, were allowed as a general average on the vessel, cargo, and freight, according to the value of each at the place of detention.

The wages and provisions of the crew, during the detention, were not allowed as a general average.

THIS was an action of covenant broken, brought upon a charter-party, dated the 9th of September, 1812, whereby the plaintiffs let

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to freight to the defendants the brig *Mentor*, on a voyage from *Boston* to *Alexandria* in *Virginia*, and thence to a port or ports in *Spain* or *Portugal*, thence to *St. Ubes* or *Tortugas*, and back to *Boston* or *New York*, at the rate of three dollars a ton, per month, and so in proportion for a less time, as the said brig would be continued in the service of the defendants, the said hire to be paid at the port of discharge in *Europe* as far as it should then be earned, and the remainder in thirty days after her arrival in the *United States;* the defendants to victual and man the vessel during the voyage, and pay all port charges and pilotage. The plaintiffs aver that the vessel was taken into the service of the defendants on the said 9th of September, 1812, arrived at *Lisbon* on the 14th of November following, and at *Boston* on the 20th of June, 1813; and that the whole of the hire aforesaid was due and unpaid.

The defendants, after oyer had of the deed declared on, which was truly recited in the declaration, plead in bar, that the vessel was, on the 6th of January, 1813, while on her passage from *St. Ubes* for *Boston*, forcibly taken from them by a *British* cruiser, carried into *Gibraltar*, and there detained until the 10th of May following; and that they have paid to the plaintiffs all the money that was due to them, according to the terms of the charter-party, for the hire of the vessel, for the whole time she was in their service, *viz.*, the sum of, &c. The replication denying this
[*67] last averment, *issue was thereupon joined, which was tried before *the Chief Justice*, November term, 1815.

At the trial, it appeared that the vessel went into the service of the defendants on the 10th of September, 1812, that she proceeded to *Virginia*, and from thence to *Lisbon* under the charter-party, and from thence went to *St. Ubes* for a cargo of salt. On her voyage homeward from the latter place, she was captured and carried into *Gibraltar*, and there libelled as prize, but was acquitted on payment of certain costs and charges, and arrived home, and was discharged of her cargo on the 24th of June, 1813, having been detained under capture from the 6th of January to the 10th of May, 1813.

It was agreed that three months' hire had been paid for in *Europe;* and half a month more was, by agreement, to be deducted from the whole time, in consequence of the vessel coming home direct from *St. Ubes*, she having had liberty by the charter-party to go elsewhere. It was also agreed that an account of the defendants against the plaintiffs for repairs, &c., amounting to 112 dollars, should be considered as payment of so much of the hire.

The defendants contended, that they were not liable, on the contract, for the hire of the vessel between the time of her capture and of her sailing from *Gibraltar;* and that the costs, charges

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and disbursements, which arose in consequence of the capture, and also the wages and provisions of the officers and crew during the detention, were a general average upon the vessel, including her hire, and upon the cargo and freight.

The plaintiffs, on the other hand, contended that they, as owners, were not chargeable with any part of the wages and provisions accruing and expended during the detention; and that the affreighters were legally bound by the charter-party to pay for the hire of the vessel, from the 10th of September, 1812, to the time of her discharge in *Boston*, without any allowance of time on account of the capture.

* A verdict was taken for the plaintiffs by consent, [*68] which was to be set aside and a general verdict entered for the defendants, or the damages reduced, as law and justice should require.

The value of the vessel was 7500 dollars; of her cargo, when shipped at *St. Ubes*, 1250 dollars; when delivered in *Boston*, 3940 dollars; and the freight from *St. Ubes* to *Boston* would have been, at the ordinary rate, 1492 dollars. It was agreed by a memorandum in the case, that whatever sums the defendants should be entitled to recover of the plaintiffs, for a general average accruing during the voyage, should be considered as payment of so much of the hire, and might be ascertained, and so applied, in this action.

For the purpose of ascertaining the sum due from the plaintiffs to the defendants for a general average, assessors were to be appointed by the Court, who were to state the account, according to the directions they should receive from the Court; and if the sum reported by such assessors to be due should be equal to the sum which, according to the principles adopted by the Court, might be due to the plaintiffs for the hire, deducting the payments above stated, the verdict was to be set aside, and a general verdict entered for the defendants. But if the sum so reported should not be equal to the sum that should be found due for the hire, deducting the said payments, the verdict was to be altered to a sum equal to the balance, after deducting the sum so reported.

The cause was argued at the last March term by the *Solicitor-General* and *Welsh* for the plaintiffs, and by *Prescott* and *Gallison* for the defendants.

For the defendants, it was contended that the wages and provisions, during a detention by a hostile capture, came properly into a general average. (1) Though general average is commonly considered as including such losses only as are voluntarily incurred;

(1) *Park*, 124, cites *Beawes*, 150. — 1 *Mag.* 67. — *Marshall*, 464.

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yet, upon examination of the authorities, it will be found to have a more comprehensive signification, and to include every [*69] *loss or expense sustained for the preservation of the whole property. (2) The case of vessels in ports of necessity, is analogous to the case at bar as to this point. (3)

The hire was not due while the vessel was under detention by capture; the effect of the capture being the loss of the control, and for the time, of the property, of the subject of the contract. It is a very strong argument against this claim of the plaintiffs, that none such is to be found in the books. By the terms of the charter-party in this case, the hire was to be paid only so long as the vessel continued in the service of the defendants. This is a peculiar mode of expression, and quite different from the form commonly used, which is, from the time of sailing to the time of discharge, or during the voyage. The question is to be governed by the marine law, and the charter-party is entitled to a liberal construction. (4)

For the plaintiffs, it was insisted that this was not a case of general average. During the continuance of the contract, the hirers were the owners of the vessel. They contracted to victual and man her during the voyage. This is a proper charge on the freight and the cargo. It is very clear that underwriters on the vessel would not be liable to this demand for wages and provisions, and the plaintiffs are to be considered as their own underwriters. (5)

As to the hire during the detention of the vessel, the covenant was express to pay for the whole time she was in the service of the defendants; that is, until she was by them restored to the plaintiffs. The contract could not be dissolved or suspended, by any principle of common or marine law, but by consent of the parties, [*70] the act of God, or the breaking out of hostilities, *or

(2) 1 *Caines*, 573, *Leavenworth* vs. *Delafield*. — *Pothier*, tit. *Charter-Party*, § 3, art. 2, No. 85. — *Casaregis Disc.* 46, No. 58. — 7 *East*, 24, *Sharp* vs. *Gladstone*. — *Abbott*, 388. — *Weskett*, tit. *Wages*, art. 10, 11, 12. — *Bynk. Ques. de Jur. Priv.* lib. 4, c. 25. — 3 *Johns.* 88, *Speyer* vs. *N. Y. Ins. Company*. — 4 *Dall.* 274, *Kingston* vs. *Girard*. — 4 *Mass. Rep.* 374, *Mayo* vs. *Maine F. & M. Ins. Company*.

(3) 4 *Mass. Rep.* 548, *Padelford & Al.* vs. *Boardman*. — 2 *Caines*, 274, *Henshaw* vs. *M. I. Company*. — 10 *Johns.* 487, *Saltus* vs. *Com. Ins. Company*. — 8 *Johns.* 307, *Barker* vs. *Phœnix Ins. Company*. — 2 *Binney*, 547, *Ins. Company of N. A.* vs. *Jones & Clark*.

(4) 3 *B. & P.* 437, *Beals* vs. *Thompson*. — 2 Lord *Raym.* 1211, *Wiggins* vs. *Ingeton*. — 1 *B. & P.* 637, *Curling* vs. *Long*. — *Abbott*, c. 7, pt. 3. — 4 *Rob. Adm. Rep.* 143, *The Friends*. — 3 *B. & P.* 291, *Touteng & Al.* vs. *Hubbard*. — *Doug.* 277. — 1 *Domatt*, lib. 1, tit. 4. — *Volt on the Pandects*, 833, 836. — *Molloy*, lib. 2, c. 4, § 3. — *Vin. Abr.* tit. *Apportionment*, C. — *Styles*, 47, *Paradine* vs. *Jane*. — 2 *Magens*, 399, art. 18.

(5) 13 *East*, 238, *Frazer* vs. *Marsh*. — 3 *B. & P.* 295, *in notis*, *Blight & Al.* vs. *Page*. — 1 *D. & E.* 127, *Robertson* vs. *Ewer*. — 2 *D. & E.* 407, *Da Costa* vs. *Newnham*. — 3 *Caines*, 155, *Penny & Al.* vs. *N. Y. Ins. Company*. — 4 *Dallas*, 246, *Jones* vs. *Ins Company of North America*.

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some act of the government, posterior to the entering into the contract, making its execution unlawful. (6)

The cause stood continued to this term for consideration; and now the opinion of the Court was delivered by

JACKSON, J. We will first consider what sum the plaintiffs are entitled to recover on this charter-party; and, secondly, what deductions are to be made from that sum, according to the agreement of the parties, for the expenses claimed by the defendants as a general average.

As to the first, the charter-party is in the common form; the defendants undertaking to victual and man the ship, and to pay three dollars a ton per month, so long as she should be continued in their service, in the voyage described in the charter-party. The natural and obvious construction of this covenant would be, that the defendants should pay, at the rate agreed on, from the time when they received the ship, until they returned her to the plaintiffs, after the termination of the voyage.

It is not therefore sufficient to say, that there is no case in which such a claim has been expressly allowed in a court of law, under circumstances like the present. It must prevail, unless opposed by some established principle relating to this species of contract, or unless the words of the covenant have, by mercantile usage, received a practical construction, different from that above suggested. We are not aware of any such mercantile usage or understanding, and none such has been proved. No case has been cited in which a claim like the present has been disallowed in any court of common law.

Abbot (part 3, c. 7, § 1, 3) expresses a doubt whether the hire on such a charter-party would be payable, in case of a capture and recapture, for the period of detention; and in 3 *Caines's Reports*, 158, *Livingston*, J., intimates a similar doubt, in case of a detention by an embargo in a foreign port. On the other hand,

* it was decided by this Court, in the case of *Minot & Al.* [* 71]
Adms. vs. *Durant*, (7) that the hirer was liable, on such a charter-party, for all the time the vessel was detained in our own ports by an embargo laid by the government of the *United States*; and in the case of *Havelock* vs. *Geddes & Al.*, cited in the argument, the hirer was held liable, in like manner, for the time consumed during the voyage in making necessary repairs on the ship. In *Molloy*, (b. 2, c. 4, § 13,) it is expressly stated, that the contract of affreightment is not

(6) 1 *Esp. Dig.* 270.—3 *Burr.* 1637, *Shubrick* vs. *Salmond.*—*Beawes*, *L. M.* 112, cites *Stolkham's Abr.*—*Molloy*, lib. 2, c. 4, § 13.—8 *D. & E.* 509, *Jackson & Al.* vs *Charnock.*—10 *East*, 555, *Havelock* vs. *Geddes & Al.*—6 *Rob. Adm. Rep.* 10, *Lo. Catherina.*—2 *Burr.* 882, *Luke & Al.* vs. *Lyae.*

(7) 7 *Mass. Rep.* 436.

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determined or dissolved by a capture and recapture, but remains after the recapture, as if the ship had never been taken; and in *Beale* vs. *Thompson* (8) the Court of King's Bench expressed an opinion that, in case of a hostile seizure or capture, if the ship is afterwards restored by the capturing power, which is the case at bar, the wages of seamen hired by the month are not stopped during the detention. From the strong analogy between seamen's wages and freight, it may be supposed that that court would have decided in the same manner on a contract for the hire of a ship payable by the month.

The weight of authority, therefore, as far as any has been adduced, may be considered as in favor of the plaintiffs. It is indeed surprising that nothing more decisive has been found, on this point, in the books of the common law; but it would appear to us still more surprising, if a claim, like that of the plaintiffs in this case, had ever been rejected.

The defendants, by virtue of this charter-party, became the owners of the ship for the voyage, or for the time stipulated in the contract. They might load her themselves, or take freight for others, on such terms as they should think proper. The whole earnings of the ship, in either case, were for their use. If she should perform her voyage in a short time, the gain would be theirs. They would have the same benefit, whether as freight on their own goods or on the goods of others, as if the voyage had been [*72] unusually prolonged; whilst *the expenses of wages and provisions, which were to be paid by them, would be reduced. On the other hand, if the voyage should be delayed by adverse winds, or by any other of the common casualties or occurrences, the defendants would sustain the whole loss arising from that circumstance. They would be held to pay the increased hire and expenses of the ship and the crew, whilst their freight or profits from the voyage would remain the same.

The plaintiffs had sold their ship for the time to the defendants, to be used in any manner not inconsistent with the contract; and as they could gain nothing, so ought they not to lose, in consequence of the particular manner in which she should be employed by the defendants. If the plaintiffs had not thus parted with their ship, they might have taken freight, or employed her in some voyage on their own account; and if it be said that the voyage might still have been prolonged by the same or the like accidents that have now occurred, the answer is, that the owners, in that case, would have had the chance of a short and profitable voyage to compensate the risk of

(8) 4 *East*, 546.

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such a delay or detention. Suppose the owners had let their ship for a certain term of years, without designating any voyage or voyages in which she should be employed; they would certainly be entitled to the hire for the whole time, although the ship should remain in port the whole time, in consequence of an embargo, from not finding suitable employment, from fear of capture by an enemy, or any other similar cause.

The application of these principles has never been doubted, when the ship has been driven out of her course by a tempest, or delayed by adverse winds; and they have been applied, as before mentioned, when she has been detained by an embargo. We can perceive no difference, as it regards this question, between a delay arising from any of those causes, and that which has occurred in the present case.

Here was a hostile seizure of the ship. This might *have been followed by a condemnation as prize, which [*73] would undoubtedly have dissolved the contract of affreightment; but in the events which have happened, it produced only a prolongation of the voyage. The ship was restored by the sovereign under whose authority she was seized. The captors therefore admit that they had no right to condemn the property, or to deal with it as captured.

It makes no difference, that the ship was carried into a port of the captors for examination before she was restored. If this seizure produced a dissolution of the charter-party, the same consequence would follow, however short might be the period of the detention, and whether she were restored by the captors upon examination of her papers at sea, or upon a like examination in port, or in a Court of Admiralty.

We must not confound this contract with that contained in a policy of insurance. The assured may, during such a detention, abandon the ship to the insurers, and recover as for a total loss; because the insurers have agreed that, in case of such an interruption of his voyage, whilst it is uncertain how soon it can be resumed, or whether it can ever be further prosecuted, he may disembarrass himself of the adventure, and that they will pay him for the ship, and take the future risks upon themselves. But the owner of the ship makes no such contract with the hirer, in a common charter-party of affreightment. He is to be paid for the whole time the ship is out of his possession, in virtue of the contract, whether her voyage be long or short, and by whatever accident she may be delayed; provided the delay do not arise from his own default; and provided also that the voyage be finally completed.

We are therefore of opinion that the plaintiffs in this case are

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entitled to the hire, as stipulated by the charter-party, without any deduction for the time the ship was detained in consequence of the capture or seizure by the *British* cruiser.

We are next to consider the claims of the defendants
[* 74] * for contribution, for sundry expenses incurred by them as a general average; which, so far as they are allowable, are, by the agreement of the parties, to be deducted from the sum due to the plaintiffs.

The necessary costs and charges, incurred and paid by the defendants in reclaiming and procuring the restoration of the ship and cargo, are undoubtedly to be allowed as a general average; and when the amount is ascertained in the manner agreed by the parties, it must be apportioned, as usual, on the ship, cargo, and freight. The sum which may thus be found due from the plaintiffs, will be deducted from that which is due to them on the charter-party.

As to the wages and provisions of the crew during the detention, we are unable, notwithstanding the very respectable authorities cited in support of this claim, to see any ground on which we can allow it, consistently with the established principles on this subject, and the course of decisions in this state.

The only case in which this charge has been allowed, in an account of a general average, in our courts, was where it was necessary to go into port, to repair damages sustained during the voyage from the perils of the sea; and the master, for that reason, voluntarily sought a port to refit. (8) Here, it is to be observed, the delay was voluntarily incurred by the master; *the mind and agency of man were employed* in producing it; and this circumstance is deemed essential in every case of general average, in contradistinction to such unavoidable detentions and losses, as arise from accident beyond the control of the master.

We see no ground of distinction, in this respect, between a temporary detention, occasioned by a hostile seizure, and one which is occasioned by an embargo, or by a tempest, or other common peril of the sea. If, upon such a seizure, the contract for wages were dissolved, and the mariners discharged from all further duty on board the ship, and if they afterwards remained under a new contract with the master, express or implied, to assist in re-
[* 75] claiming the ship and cargo for * the respective owners, the compensation due to them for that service would be justly brought into an account of general average. It would then be an expense voluntarily incurred by the master, for the benefit of all concerned in the adventure. It is upon this ground, that the

(8) 4 *Mass. Rep.* 548, *Padelford & Al.* vs. *Boardman.*

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wages and provisions of the crew, in such a case, have been allowed as general average in the Supreme Court of the state of *New York*; (9) but it is said by the same Court, that if the service for which contribution is claimed results from a previous obligation on the party rendering it, or is the effect of a previous stipulation or contract, the compensation for that service is not to be defrayed in this manner. (10) Now, we apprehend that the contract of the mariners is not necessarily dissolved by such a capture. If it were so, it is not easy to see why the same consequence would not follow, as to this contract, which we before mentioned with respect to a charter-party; and a mere seizure by a ship of war, and an examination of the papers at sea, would exonerate the mariners from their obligations to the master.

But without relying on this extreme case, the operation of this principle, after the ship had been carried into port for adjudication, would often prove highly injurious to the interests of commerce. Suppose a belligerent cruiser, from ignorance or cupidity, should seize and send into port a neutral ship, against which there was no just ground of complaint or suspicion; and that the ship, on her arrival in port, should be immediately restored to the master; if she had not been sent far out of her course, this might prove only a short and unimportant delay of her voyage. But if all the pre-existing contracts relating to the voyage are absolutely at an end; if the mariners may lawfully desert the ship; or if the master, on his part, may dismiss the crew, and consider his charter-party annulled and his voyage determined, and may proceed, as in case of a shipwreck, to sell or dispose of the whole property, — the consequence would often be a total loss and destruction of the voyage.

*This would put it in the power of the master to ter- [*76]
minate the voyage at his pleasure, and to charge the insurers for a total loss, if he should find the markets were bad at his port of destination, and that the adventure was likely to prove unprofitable; and if, on the other hand, the prospects were favorable, and he should desire to prosecute the voyage, it might be defeated by the refusal of the mariners to proceed, if it should happen in a port where he could not procure another crew. If it should be thought that the rule would not apply, when the ship was thus early restored to the master, and that it is only after a libel in a Court of Admiralty that the contracts for freight and wages are dissolved, — we answer, that there is no reason for stopping at that point; and that, if the contracts in question are not dissolved until

(9) 1 *Caines's Rep.* 573. (10) 2 *Caines's Rep.* 267.—3 *Caines*, 159.

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proceedings against the ship are commenced in a Court of Admiralty, they ought not to be dissolved until the capture is consummated by a condemnation.

If the services of the mariners, after such a capture of the ship, are upon a new implied contract, it is a little singular that their compensation should depend, not on the nature and the value of the services thus rendered, but on the accidental circumstances of the duration of the voyage before the capture. Yet this is the rule universally adopted, in ascertaining the *quantum meruit* for those services upon this supposed new contract. If the ship should be condemned, they would lose all their wages from the last port of delivery; but if she is restored, they receive their whole wages until the termination of the voyage. Now, their services after the capture would be equally useful and meritorious, whether the ship had been in the prosecution of her voyage one week, or one year, before the capture. So, if the mariners should desert the ship immediately after a capture, they would most certainly lose their wages, even though she should afterwards be restored and perform her voyage. If, then, they are entitled to their whole wages, by remaining with the ship and finally completing the voyage, [*77] the amount received * by them is paid wholly for their services after the capture; and the whole sum paid, down to the time of the restoration of the ship, ought therefore to be brought into the general average, unless it is paid upon the principle which we adopt, that is, upon the original contract between the master and the mariners. Yet it has not been pretended, in this case, that any sum due for wages before the capture ought to be included in the general average; and we believe the claim has never, in any case, been carried to that length.

It may be added, that, if the sums thus due to the mariners are considered solely as compensation for their voluntary services in reclaiming the ship, and not as wages for their services as mariners, it ought to be paid to them in all events, whether the voyage be finally performed or not. Their claim would rest on the same footing as that of any other agents, or persons employed in procuring the restoration of the property. Yet no distinction is ever made, in this respect, between the sum payable to the mariners on this account and that which is due on their contract for wages; and if the ship, after her restoration, should be lost by the common perils of the sea; before completing her voyage, it has never been doubted that the mariners would lose their whole compensation from the last port of delivery, including the period of detention, as well as the other part of the voyage.

It might be sufficient for us, in considering this question, to refer

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to the case of *Brooks* vs. *Dorr & Al.*, (11) in which it was expressly decided by this Court, that the capture of a ship, which was afterwards restored to the master, did not dissolve the contract for wages, and that a mariner was entitled to recover on that contract, although he was taken out of the ship at the time of the capture, and did not afterwards perform any service on board of her. The same principle, although it has been sometimes questioned, is supported by many very respectable authorities. It was adopted by Lord *Kenyon* in the case of *Pratt* vs. *Cuff*, cited in 4 *East*, 43, by Lord *Eldon* in the case of *Bergstrom* vs. *Mills*, 3 *Esp. N. P. Cases*, 36, by the whole Court of King's [*78] Bench in the case of *Beale* vs. *Thompson*, and in sundry cases in the Courts of the *United States* for the district of *Pennsylvania*.

We are aware of the inconvenience which might be suffered, on the one hand, by the owners, if the master should be required to maintain his whole crew in a foreign port during a long course of admiralty proceedings, and after he had wholly despaired of regaining the possession of his ship; and, on the other hand, by the mariners, if they should be compelled to remain with the ship, after all hopes of her restoration were abandoned, and with the certainty of losing their whole wages in case of her condemnation.

But these consequences would not perhaps necessarily follow from the principles we assume. It may often promote the convenience of all parties, and the interests of commerce, that the mariners should be discharged, when it is known that the proceedings in the Admiralty Court will be protracted to an unusual length of time, and when it appears probable that the ship will be condemned. But if it should be decided that, in such a case, the mariners have a right to be discharged, upon relinquishing all claims to wages for the preceding part of the voyage; or that a master has a right to discharge them, upon paying the amount of wages due up to that time; still it would not follow that the contract for the service and wages was absolutely dissolved by the capture, against the will of both parties. We give no opinion on that point at present; because we apprehend that, even if the master and mariners had respectively the right mentioned, yet, if the mariners do, with the assent of the master, remain on board and discharge their duty, and if, upon the restoration of the ship, they complete the voyage in her, they are entitled to their wages upon the footing of the original contract.

We have been the more particular in examining this point, because on this depends the principal question now under consider-

(11) 2 *Mass. Rep.* 39.

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[*79] ation. We are not aware of any *other ground upon which the wages and provisions of the crew, during a detention of this kind, have ever been included in a general average. It appears to us that these expenses ought to fall exclusively on the owner of the freight for the voyage, whether he is the owner, or the hirer, of the ship. It is merely an interruption or delay of the voyage which diminishes his profits. The ship owner might as well claim a contribution for the wear and tear of his ship during the detention, or the owner of the cargo for the interest of his money, for the deterioration of his merchandise, or for the loss of a market by the delay, as the owner of the freight for the extraordinary wages and provisions expended on such an occasion.

A question still remains, as to the proportion in which the respective parties are bound to contribute for the costs and expenses, which we have considered to be payable as a general average. This ought to be settled in the same manner as if the three articles liable to contribute, *viz.*, the ship, cargo, and freight, were owned by different persons, or as if they were severally insured by different sets of underwriters. In such a case, each party would contribute according to the real value and amount of his interest, without regard to the particular contracts relating to the voyage. If, for example, the owner had agreed, in one event, to receive nothing for the carriage of the goods, in consideration of which he was to be entitled, in another event, to receive double the customary freight, still, in settling the contribution to a general average, the freight would be estimated at the customary rate for such a voyage. Again, as this contribution is claimed as a recompense for services rendered, and not a compensation for property voluntarily sacrificed for the common good, the party who performed or paid for those services was entitled to his recompense, although the ship should have been afterwards totally lost before completing her voyage.

The contribution therefore must be adjusted according
[*80] to the value of the respective articles saved, at the *time when the expense was incurred; in like manner as if all the three parties had been present, and each had originally paid his own proportion.

If the contribution had been claimed for goods thrown overboard, or for a mast cut away, the adjustment of it would be necessarily postponed until the termination of the voyage; because until that event, it could not be known whether any thing would be saved, from which to claim a contribution; and also because each party would be held to contribute according to the value of what should come to his hands at the termination of the voyage.

The value of the ship is agreed by the parties; and as it does not

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appear whether that estimation was made with respect to the time when she was at *Gibraltar*, or to the time of her return to *Boston*, we may presume that this circumstance would not materially vary the result. The value of the cargo is also agreed, when received on board the ship at *St. Ubes*. This must be taken as the value, for which the cargo should contribute, unless it should appear to the assessors that it had acquired an additional value by being carried to *Gibraltar*. From the relative situation of the two places, it is not probable that any such change in value took place. The price at which it was finally sold in *Boston* cannot affect this estimation, because the contribution would have been the same if it had never arrived there, or at any other port of delivery. The value of the freight will also be settled by the assessors, according to the customary rate of freight at that time from *St. Ubes* to *Boston*, which is agreed by the parties to be 1492 dollars, deducting from that sum the amount of the wages and provisions which would usually be expended in such a voyage; and the balance will be the net value, for which the owner of the freight must contribute.

When goods are carried on freight, the actual amount of the freight list is the best evidence, and, indeed, is generally considered conclusive, as to the gross amount of freight. But when, as in this case, the cargo is the * property of the same [*81] person who owns the ship for the voyage, so that no price is stipulated for the carriage of the goods, we know of no other mode of estimating the freight than that above mentioned. In this estimate no freight is included for any preceding voyage or passage; because that was all earned, and is presumed to have been paid, before the ship left *St. Ubes*. On the other hand, the estimate includes the freight to be earned during the remainder of the passage, from *Gibraltar* to *Boston*; because that, as well as what had been earned, if any, between *St. Ubes* and *Gibraltar*, would all have been lost, if the ship had been condemned.

This does not militate with the principle before mentioned, as to adjusting the contribution at *Gibraltar*, and not at *Boston*; because this is the true value of the interest which the owner of the freight then had in the common adventure; this is the amount of his property at risk on that voyage. It is true that, if the ship had been afterwards lost, he would have lost his freight; and so would the ship-owner have lost his ship, and the merchant his cargo. Yet they must all contribute, according to the value at *Gibraltar*. The freight, as it does not depend on markets, will always be estimated at the same value, whether the estimate shall be made at the port of destination, or at any intermediate port.

For the value of the freight, when thus ascertained, the plaintiffs

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alone must contribute to the general average. If the ship and cargo had been condemned at *Gibraltar*, the plaintiffs would have lost their whole freight for that voyage; they would have received nothing for the hire of the ship, after she left *St. Ubes*. And although the sum for which they are now to contribute is less than the actual amount of the hire in this case, yet that arises from the special contract which they made; and the result would be the same, if by that contract they should eventually have received nothing.

[*82] *The defendants had no interest in the freight. If the voyage had been lost by a condemnation at *Gibraltar*, they would have lost nothing but their cargo. They ought therefore to contribute only for the value of the cargo. They had at that time paid nothing towards the freight of their goods from *St. Ubes* to *Boston*, and were not liable to pay any thing, if the property had all been lost at *Gibraltar*. And as they were not the actual owners of the ship, they would not have suffered if she had carried nothing on that voyage.

We are aware that this manner of apportioning the general average on the freight, and charging the whole of it on the plaintiffs, differs from that which was proposed by this Court in the case of *Douglas* vs. *Moody & Al.* (12) But in that case, as no general average was recoverable, the point was not necessarily involved in the determination of the cause, and probably might not receive so much consideration as if the facts had required the application of the principle. The eventual profit to the hirer, on the arrival of the ship at her port of destination, may be considered in some view as freight. But it is, in truth, only the fund out of which he pays the freight; and all that he earns above that sum is the mercantile profit upon his adventure. And as to the sum paid as freight, he pays only after he has received it by the safe arrival of the ship; and if she never performs the voyage, he pays nothing; so that in this particular he risks nothing. It is true that the hire or freight, to be paid to the ship-owner on the arrival of the ship, may be considered in some views as his profits on the adventure, and as resembling the expected profits on the cargo; and it is for this reason that, in some commercial codes, the freight is not considered as a vested interest or property, nor as the subject of insurance. But by our law, the freight is always treated as a distinct property, which, at the commencement of the voyage, is put into the common stock with the ship and the cargo. It is exposed to the like perils, is

[*83] insurable like them; and the owner of it is interested, *in

(12) 9 *Mass Rep.* 548.

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proportion to its amount, in the successful termination of the voyage. He ought therefore to contribute, in that proportion, to all the expenses and losses incurred for the common benefit

EBENEZER SEAVER, Appellant, *versus* JAMES LEWIS AND WIFE.

Doubtful words in a will are not to operate the exemption of the testator's personal property from the payment of debts, and charging them on the real estate.

[Where the testator directed his debts to be paid, and, to enable his executors to discharge the same, if possible, without disposing of his *stock on the farm*, ordered certain unimproved lands to be sold, and the surplus arising from the sale, after all his debts were paid, to be equally divided between his four children, and gave all his houses, lands, wearing apparel, stock, and other personal estate, except what was otherwise disposed of in his will, to his two sons; — held, that the personal estate, except the stock on the farm, was not exonerated from the liability of being first applied in payment of the testator's debts. — ED.]

THIS was an appeal from an order or decree of the judge of probate for this county. The facts in the case were as follows: —

Ebenezer Seaver, deceased, made his last will on the 24th of December, 1784, appointing his wife and his son *Ebenezer*, the appellant, executors. After declaring it to be a disposition of his whole estate, he directs all his just debts and funeral charges to be paid by his executors, and then adds: "And to enable them to discharge the same, if possible, without disposing of the stock on the farm, I do hereby will and empower my said executors to make sale of all my lots of wild and unimproved land in the county of *Hampshire*, and to give and execute a good deed or deeds thereof in the law." He then devises to his two sons, *Ebenezer* and *Joshua* in fee, all his houses and lands in *Roxbury*, and all his wearing apparel, stock, and other personal estate, *except what is otherwise disposed of in the will*, to be equally divided between them. And after giving to his two daughters, *Hannah* and *Margaret*, one hundred pounds lawful money each, he adds this provision: "And my will further is, that, in case there should be a surplusage of money arising from the sale of my unimproved lands in the county of *Hampshire*, after all my debts are paid, such surplusage shall be equally divided between my four children, *Ebenezer*, *Joshua*, *Hannah*, and *Margaret*."

Upon an administration account rendered by the said *Ebenezer*,

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and allowed by the judge of probate, there remained in
[*84] the said *Ebenezer's* hands, as executor, the *sum of £226 10*s.* 6*d.*, after the payment of all debts and legacies; which sum included the proceeds of the sale of the said lands in *Hampshire*, they having produced a greater sum than the said balance.

The respondents, in right of the wife, who is the testator's daughter *Hannah*, claimed one fourth of the said balance, alleging that it was due to her, as the surplusage arising from the sales of the *Hampshire* lands after payment of the debts as directed in the will.

The appellant insisted that the said balance belonged to him and his brother *Joshua*, in virtue of the gift to them of the personal estate, alleging that the said lands ought to be first applied to the payment of debts in relief of the personal estate; and that, the said lands not having produced a sum sufficient for the payment of the debts, no surplusage had come to his hands for distribution, within the intent of the testator.

The judge of probate having ordered the said *Ebenezer* to account to the respondents for the said fourth part of the said sum in his hands, he appealed from the said order to this Court.

Morton, (Attorney-General,) for the appellant. Although it is not in a testator's power to exempt his estate from the payment of his debts, and regularly the personal estate is first to be applied to that object, yet he may otherwise direct, and appropriate the whole or a part of his real estate, as a fund, out of which his debts shall be paid. The testator in this case did so. His desire plainly was to save his personal estate for his sons, so far as his wild lands would reach for that purpose; constituting those lands a specific fund, out of which the debts should first be paid. (1)

Amory, for the respondents. Had there been no particular bequest of the personal estate in this will, this question would never have been raised; but that gift was to take effect only after payment of the debts. A testator, charging his real estate with the payment of debts, does not thereby hinder the application of the personal estate first, unless such provision is expressly
[*85] *made. (2) Here was no exemption of any part of the personal estate, except of the stock; although the specific personal legacies may fairly be exempted by implication.

WILDE, J., delivered the opinion of the Court. — This case comes

(1) 2 *Black. Com.* 512, note 15, by *Christian*, cites 2 *Bro. Chanc. Rep.* 60.

(2) 3 *Bro. Parl. Cases*, 16, *French* vs. *Chichester*. — 1 *Bro. Ch. Rep.* 144, *Samwel* vs. *Wake*. — *Ibid.* 459, *Ancaster* vs. *Mayer*. — *Toller's L. of Exrs.* 332. — 3 *P. Will* 334 - - 1 *Wils.* 82. — 2 *Eq. Ca. Abr.* 493.

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before us on an appeal from a decree of the judge of probate for the county of *Suffolk*; and the question to be determined depends on the construction of the will of *Ebenezer Seaver*, deceased, under which the litigating parties claim. [Here his honor recited the several clauses of the will, as above.]

After the death of the testator, the lands in *Hampshire* were sold by the executors, in pursuance of the will, and the debts and legacies were paid; the executors still having in their hands a surplus of the aggregate fund, consisting of the proceeds of the sale of the lands, and of the value of the personal estate, excepting the stock on the farm and the testator's wearing apparel; one fourth part of which surplus the respondents claim, by virtue of the last provision in the will.

But the appellant contends that, by the true construction of the will, it must be understood that the intention of the testator was to charge the unimproved lands in *Hampshire* with the payment of his debts, in relief of his personal estate generally; and that the proceeds of the sale ought to be applied as the first fund for that purpose.

This position, however, cannot be maintained, unless it appears that such was the manifest intention of the testator. For by law the personal estate is the proper fund for the payment of debts and legacies; and must be so applied, unless it be exempted, either by express words or by necessary implication. Such an implication is supposed to arise from the specific bequest of the personal estate to the sons; and if it were absolute, and were not controlled by any other clause in the will, the implication would appear plain and obvious. But the whole personal estate is not given to the sons; there being an exception of such parts thereof as had
*not been before disposed of. The disposition thus [*86]
referred to is probably to be found in the first clause of
the will; whereby the personal estate, with the exception of the stock on the farm, is made subject, as we understand the will, to the payment of debts and legacies.

The reason given for charging the lands is, that the debts may be paid, *if possible, without disposing of the stock on the farm.* This plainly indicates an intention to exonerate the stock, and the stock only. No other reasonable construction can be given to this part of the will. For if the testator's meaning had been to charge the lands in the first place, and that the personal estate was to go to his sons, should the funds arising from the sale of the lands be sufficient to discharge the debts and legacies, there could have been no difficulty in expressing such an intention distinctly and clearly; as by expressly charging the lands to that extent, or by directing

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them to be sold at all events for the payment of debts, or by substituting the words *personal estate* for *stock on the farm.*

But no such intention is to be collected from any part of the will. The testator appears to have understood that his personal estate was liable for the payment of debts, and that it might be insufficient without including the stock, which he was desirous of preserving for the use of the farm. It being, however, uncertain what might be the amount of his debts, he provides for all probable contingencies. If the personal estate should be more than sufficient for the payment of debts and legacies, the surplus was to go to his sons; and if not sufficient, the fund arising from the sale of the land was to be applied, so far as might be necessary, to make up the deficiency; and the residue was to be divided between his four children. This seems to be the natural and obvious construction of the will, and the only one which can comport with the peculiar phraseology of the clause first cited.

It has been argued that an intention inconsistent with this construction is manifested by other parts of the [* 87] * will. For, as the testator intended to dispose of his whole estate, and as he made no disposition of his *Hampshire* lands, in case the personal estate should be sufficient to pay the debts, the inference drawn is, that it was his intention that those lands should be sold at all events, and applied to the payment of debts.

But it must be recollected that the testator seems to have apprehended that his personal estate would not be sufficient to discharge his debts; and even that the interposition of the sale of his *Hampshire* lands might possibly not save the stock. He might therefore well suppose that the sale of those lands would be necessary, on the construction we adopt; and, in fact, they were so. He accordingly disposed of the surplus of the proceeds of the sale, instead of devising the lands.

Supposing, however, that the construction of the will is doubtful; still the appellant ought not to prevail; it being a rule of law, that no doubtful words in a will shall have the operation of exempting the personal property from the payment of debts, and of charging them on the real estate.

This principle alone is decisive; and will warrant the affirmance of the decree of the judge of probate.

Decree affirmed.

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*JOSEPH WHITNEY *versus* SAMUEL A. WHITNEY.

Tenant in fee devises his whole estate to his wife during her widowhood, and after her death or marriage, wills that it may be distributed in the same manner as though it had not been devised; and dies leaving several children. After the death of the testator, and before the marriage or death of his widow, one of his sons dies insolvent, leaving an only son and heir. It was holden that the reversion was chargeable with the debts of the deceased son of the testator.
Of the construction of the statutes.

IN this action, which was *assumpsit* for the use and occupation of certain real estate, the parties agreed that *Samuel Whitney*, grandfather of the plaintiff, died on the 1st of July, 1808, having before made his last will, after his death duly approved and allowed, in which will he devised and bequeathed to his wife, *Abigail Whitney*, the use, occupation, improvement, and income, of all his estate, real and personal, so long as she should live and remain his widow, except the bequests thereinafter mentioned; she to pay any debts he might owe at his decease, and to support and maintain the family, in the same manner it was supported by the testator. After several other provisions, directions, and legacies, not material to the question submitted to the Court, there is the following residuary clause, *viz.:* "All the remainder of my estate, both real and personal, after the decease or marriage of my said wife, I will and desire may be distributed in the same manner as though it had not been devised." His wife, *Abigail*, is therein appointed sole executrix, which trust she declined; and *Samuel A. Whitney*, the defendant, was afterwards appointed administrator, with the will annexed.

The testator left several children, one of whom was *Joseph Whitney*, father of the plaintiff. The said *Joseph* died after his father, and before his mother, leaving the plaintiff his only child and heir.

The said *Abigail Whitney* continued in the use and occupation of the real estate of the testator, by virtue of the said will, until her death, which was in July, 1813, she never having been married after the testator's death.

The said *Joseph Whitney*, the plaintiff's father, died insolvent, and indebted to the estate of his father; and the defendant is administrator of his estate.

*After the decease of the said *Abigail Whitney*, the [*89] defendant, as agent of the heirs of the said *Samuel Whitney*, the testator, entered upon the real estate, of which the said testator died seised, and received the rents and profits thereof.

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If, in the opinion of the Court upon these facts, the plaintiff was entitled to a share in the distribution of his said grandfather's estate, after the decease of the said *Abigail Whitney*, the defendant agreed that judgment should be rendered upon his default; otherwise, the plaintiff was to become nonsuit.

Davis, (Solicitor-General,) for the plaintiff, contended that the remainder, limited over upon the death of the widow, vested in the plaintiff at the death of his grandmother, the tenant for life. At that time he was one of the heirs of the testator; and it is a well-known principle of the common law, that a remainder may be limited by description or circumlocution. (1) The intention of the testator is plainly expressed, *viz.:* that this estate should go to such persons, at the death or marriage of his widow, as the law should *then* designate as his heirs at law, of whom the plaintiff was one.

Minot, for the defendant, argued that the residue of the testator's estate, after the death or second marriage of his widow, whether it were a remainder or reversion, vested, immediately on his death, in his heirs at law. It is apparent that such was his intention. He wished only to make a better provision for his widow, than she would take, if he should die intestate, and then to let the estate go to his heirs at law, of which the plaintiff was not one. (2) The share of *Joseph Whitney*, the plaintiff's father, having vested in him, at his father's death, the defendant, as his administrator, must account for it, as assets in his hands, for the benefit of his creditors.

WILDE, J., delivered the opinion of the Court. On the statement of facts in this case, it has been argued by the counsel for the defendant, that, by the will of *Samuel Whitney*, his widow took an estate for life, determinable on her second marriage, and
[*90] his heirs a * remainder in fee, which not depending on a contingency, vested in them at his death; and that *Joseph Whitney's* share thereof is assets in the hands of his administrator.

On the other hand, it has been argued for the plaintiff, that the devise over to the heirs is void; and that the share of the estate in controversy descended to the plaintiff, at the death of the widow, as heir to his grandfather, and is not, therefore, to be charged with the payment of his father's debts.

If the devise over to the heirs can be supported, there can be no doubt that, on the death of the testator, a remainder in fee vested in *Joseph Whitney*, which would be assets in the hands of his administrator. For in such case, the plaintiff must claim as heir to *Joseph;* and his title might be defeated by the administrator's sale

(1) 4 *Bac. Abr.* 307.
(2) 2 *Leon.* 70. — 3 *Atk.* 136, *Smith* vs. *Ashurst.* — *Com. Dig* tit. *Estate*, B. 17. — 2 *Black. Com.* 171.

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of the estate, the claim of the creditors being paramount to that of the heirs.

But on examining the books, it appears clearly that the devise to the heirs cannot be supported. The rule of law is, that a person cannot raise a fee to his own right heirs, by the name of heirs, as a purchase, unless he parts with his whole estate. So, if he makes a devise to them, without changing the tenure of the lands, although he charge them with debts or other encumbrances, yet the heirs shall take by descent. Or if, after several mesne estates, he should limit the ultimate *remainder* to his own right heirs, the remainder would be void, and the reversion would descend as if no limitation over had been made. For whether they should take a remainder or reversion, they would have an absolute fee, after the termination of the mesne estates; and the title by descent is, in estimation of law, the worthier title. (3)

Upon these principles, *Joseph Whitney*, on the death of his father, took a reversion in his estate; and the only remaining question to be considered is, whether such *reversion* be liable to the payment of his debts in the hands of his administrator.

It is a well-settled principle of law, that there can be
* no mesne seisin of a remainder or reversion expectant [*91]
on an estate of freehold, so as to make a *possessio fratris*, by the law of *England;* or to enable the mesne remainder-man or reversioner to transmit the estate to his heirs as an inheritance. It is true, such descent may be turned by the grant or other disposition of the remainder or reversion, by the mesne remainder-man or reversioner. So, if a mesne reversioner binds himself and *his heirs* in an obligation, and dies leaving the tenant for life, the reversion will be assets, or *quasi* assets, in the hands of the heir; and a creditor may have judgment, *quando acciderint.* Or if judgment be had against a mesne reversioner in his lifetime, it will bind the property, although no execution be taken out until the property descend to others; such acts of ownership and charges on the reversion being considered as equivalent to the actual seisin of an estate, which is capable of being reduced to possession by entry. (4)

But if no such acts of ownership be exerted, or no such charges be made, the reversion or remainder will continue to devolve, on the death of each particular heir, to the next heir of the donor, or the remainder-man, as the case may be, until the determination of the particular estate; when it will vest in possession in him who is then the right heir of the donor, or original remainder-man. And

(3) *Co. Lit.* 22, *b.* — *Watkyns on Descents*, 280, 259.
(4) *Watk.* 137, 110, 141. — 2 *Cruise's Digest*, tit. *Reversion*, § 20, 24. — *Carth.* 129 — *Lutw.* 503.

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the person taking such reversion or remainder will hold it free from the debts of the mesne reversioner or remainder-man, as he would not inherit from him, but from the original donor.

Upon these principles of the common law, the plaintiff must be considered as inheriting the estate in question, as heir to his grandfather; the same not being assets for the payment of the debts of his father, the mesne reversioner.

It remains to be considered, whether these principles have been changed by statute.

At an early period of our colonial government, we find that *lands* and *houses* were made liable to the payment of debts: since
[* 92] which period, both before and after * the revolution, several acts *in pari materiâ* have been passed, the general policy of which seems to be, to charge the whole of a man's estate with the payment of his debts; and this policy, founded in manifest justice, ought to be enforced in this case, if the several laws in the statute-book, or any one of them, will admit of a reasonable construction to this effect.

By the statute of 1783, c. 36, § 3, it is enacted, "that the real estate" of deceased debtors "shall stand chargeable with all the debts of the deceased, over and above what the personal shall be sufficient to pay." And by the statute of 1784, c. 2, for the distribution of insolvent estates, provision is made that the estates of insolvent debtors, both *real and personal*, shall be distributed among their creditors.

It is true that, strictly speaking, reversions and remainders are not real estate; yet they are sometimes so considered; for by a grant of land a reversion will pass; and if so, then the administrator, by making sale of the land, may well pass the reversion. According to common intendment, *real* estate includes every thing not *personal;* and such is doubtless the meaning of these statutes. By the terms *real* and *personal* estate, the legislature must be understood as intending to comprise a man's whole property. A similar intention is manifested by the statute of 1805, c. 90, § 5, whereby all the *lands, tenements, and hereditaments*, of a deceased debtor are made liable to the payment of his debts. Now, a hereditament includes whatever may be inherited, be it corporeal or incorporeal, real, personal, or mixed; and although it may not comprise, in a legal sense, reversions and remainders, yet the legislature, in making use of a term thus comprehensive, have sufficiently expressed an intention of charging the whole estate And we can see no good reason why we should not give a construction to these statutes conformable to such an intention.

The language of a statute is not to be construed according to

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technical rules, unless such be the apparent meaning of the legislature. Therefore many cases, * not expressly [*93] named, may be comprehended within the equity of a statute; the letter of which may be enlarged or restrained, according to the true intent of the makers of the law.

On the whole, we are of opinion that the reversion in question is by law chargeable with the debts of *Joseph Whitney*, the mesne reversioner, and that the plaintiff, according to the stipulation of the parties, must be called.

Plaintiff nonsuit. (*a*)

(*a*) [The intention of the legislature must, in all cases, be ascertained by the words of the act. Though the judges, in interpreting the law, (says Mr. *Dwarris*,) are to explore the intentions of the legislature, yet the construction to be put upon an act of Parliament must be such as is warranted by, or at least not repugnant to, the words of the act. Where the object of the legislature is plain and unequivocal, courts ought to adopt such a construction as will best effectuate the intentions of the lawgiver. But they must not, in order to give effect to what they may suppose to be the intention of the legislature, put upon the provision of a statute a construction not supported by the words, though the consequence should be to defeat the object of the act. — *Rex* vs. *Stoke Damerel*, 7 *B. & C.* 569. — Where the legislature has used words of a plain and definite import, it would be dangerous to put upon them a construction which would amount to holding that the legislature did not mean what it has expressed. The fittest course, in all cases where the intention of the legislature is brought in question, is to adhere to the words of the statute, construing them according to their nature and import, in the order in which they stand in the act. — *Rex* vs. *Ramsgate*, 6 *B. & C.* 712. — The most enlightened and experienced judges have for some time lamented the too frequent departure from the plain and obvious meaning of the words of the act by which a case is governed, and themselves hold it much the safer course to adhere to the words of the statute construed in their ordinary import, than to enter into any inquiry as to the supposed intention of the parties who framed the act. — *Rex* vs. *The Inhabitants of Great Bentley*, 10 *B. & C.* 527. — They are not to presume the intentions of the legislature, but to collect them from the words of the act; and they have nothing to do with the policy of the law. This is the true sense in which it is so often impressively repeated that judges are not to be encouraged to direct their conduct "by the crooked cord of discretion, but by the golden metwand of the law," i. e., not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness. — 2 *Dwar.* 703. — "Our decision," said Lord *Tenterden*, in a late case, "may perhaps operate to defeat the object of the statute, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to be the intention of the legislature." — *Rex* vs. *Barkar*, 8 *B. & C.* 104. — In another case, the same learned judge said, "The words may probably go beyond the intention; but if they do, it rests with the legislature to make an alteration: the duty of the court is only to construe and give effect to the provision." — *Nottey* vs. *Buck*, 8 *B. & C.* 164. — "It is safer," said Mr. *J. Ashurst*, "to adopt what the legislature have actually said, than to suppose what they meant to say." — 1 *T. R.* 52. — "We can only say of the legislature," said Lord *Ellenborough* in a particular case, "Quod *voluit non dixit*." — 6 *East*, 518. — See, too, *Rex* vs. *Turvey*, 2 *B. & A.* 522. — *Rex* vs. *Bray*, 3 *M. & S.* 20. — In *Branding* vs. *Barrington*, (6 *B. & C.* 475,) Lord *Tenterden* said, "It is said it was within the equity of the statute; speaking for myself alone, I cannot forbear observing that I think there is always danger in giving effect to what is called the equity of a statute; and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases, had their attention been directed to them." A *casus omissus* can in no case be supplied by a court of law; for that would be to make laws. Judges are bound to take the act as the legislature have made it." — 2 *Dwar.* 711. — ED.]

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ABIGAIL CODMAN AND ANOTHER *versus* ISRAEL JENKINS.

Assumpsit for use and occupation cannot be maintained by the assignee of a lease for life, although an express promise from the lessee to the assignee be proved.

THIS action was *assumpsit* for the use and occupation of certain real estate, and was submitted to the determination of the Court, upon the following facts stated and agreed by the parties: —

The said estate was formerly the property of *Anne Austin*, the late wife of *John Austin*, and the plaintiffs are her heirs at law. After the death of the said *Anne*, who died without ever having had issue by her said husband, the said *John* being in possession of the premises, claiming them as his own, and having been in pos session thereof more than twenty years, and ever after his intermarriage with the said *Anne*, did, on the 15th of August, 1803, make a lease of the premises to the defendant, for the natural life of the said *John*, at the yearly rent of twenty dollars. On the 4th of August, 1807, the said *John* conveyed the said estate to the plaintiffs, by a deed of release or quitclaim. The said *John* is yet alive, and the defendant claims to hold the premises by virtue of the said lease, having never been dispossessed. The plaintiffs were never in possession of the said estate, except constructively by the said deed of the said *John*, or otherwise as heirs of the [*94] said *Anne*. The defendant never paid the rent, * which, by the said lease, he covenanted to pay, to the said *John*, or to the plaintiffs, but has always been ready to pay the same to his lessor, according to the terms of the lease, though he has never tendered the same, either to the said *John* or to the plaintiff; nor has he ever made any express promise to pay the same to the plaintiffs. At the date of said lease, the premises were pasture land; and the defendant, since the making of the lease, has built a house thereon.

Upon these facts it was agreed that judgment should be entered, agreeably to the opinion of the Court, by the default of the defendant, or the nonsuit of the plaintiff, as the case might be.

The cause was argued at the last March term, by *Davis* (*Solicitor-General*) for the plaintiffs, and *W. Austin* for the defendant.

Davis. The plaintiffs claim, not as heirs of *Anne Austin*, but as assignees of *John Austin*. As such assignees, they have all the actions and remedies to which the assignor was entitled; and where there is an assignment of a reversion, and a lease outstand-

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ing, the rent passes by the assignment, as appurtenant to the reversion; (1) for which *assumpsit* lies. (2)

No attornment is necessary in a case like this, even if the statute of 4 and 5 *Anne*, c. 16, has not been adopted in this state. That ceremony was, in part at least, to supply the place of livery of seisin, which, by our statute, is dispensed with, the acknowledgment and registry of the deed being made equivalent. But as the statute of *Anne* was an improvement of the common law, (3) it must be taken to have been here adopted and used as our common law. (4)

Austin. The defendant resists this action, not from any confidence in the validity of his own title, but to prevent a mischief to himself. The plaintiffs must entitle themselves to the possession of the land, before they can demand the rent. In an action for the land, he could avail himself of the benefit of the statute of 1807, c. 74, and he could have his remedy against his grantor upon the covenants, in case of a recovery.

*The case of *Birch* vs. *Wright* was decided under the [*95] statute of 11 *Geo.* 2, c. 19 — which has certainly not been adopted here — and not on that of *Hen.* 8. *Assumpsit* cannot be maintained for rent where there is a covenant to pay it. (5)

John Austin had nothing in the land. His deed, then, to the plaintiffs conveyed nothing. The plaintiffs therefore can claim only as heirs of *Anne Austin*; and having never been in possession, there is no privity between them and the defendant.

The cause stood over to this term for advisement, and now the opinion of the Court was delivered by

WILDE, J. The estate, for the use and occupation of which this action is brought, having been demised by one *John Austin* to the defendant, to hold during the life of the lessor, at the yearly rent of twenty dollars, and the reversion having been afterwards conveyed to the plaintiffs, it has been argued that they have a right to recover the rent, as incident to the reversion, in this form of action.

It is, however, a well-settled principle, that an action of *assumpsit* for use and occupation will not lie where rent is reserved by deed; the proper action, in such case, being debt or covenant. It is, in deed, said, in some of the books, that *assumpsit* may be maintained upon an express promise; although the plaintiff may be entitled to

(1) *Stat.* 32, *H.* 8, c. 34.—3 *Mass. Rep.* 153, *Newhall & Al., Adm.*, vs. *Wright.* — *Doug.* 279, *Moss* vs. *Gallimore.*
(2) 1 *D. & E.* 378, *Birch* vs. *Wright.*
(3) 2 *Black. Comm.* 290.
(4) 2 *Mass. Rep.* 179.
(5) 2 *H. Black.* 323, *Naish* vs. *Tatlock* —*Comyns on Contracts*, 510.

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a remedy of a higher nature, as debt or covenant. But the better opinion seems to be, that this principle must be limited to cases where some new consideration forms the basis of the promise, as where there is a promise to pay the balance due on settlement of an account, including rent in arrear; or where other matter is taken into consideration, and included with the rent. (6)

In conformity to this principle, the statute of 11 *Geo.* 2, c. 19. § 14, which provides a remedy for the recovery of rent, by action of *assumpsit* for use and occupation, limits it to cases where the agreement is not by deed. Nor is it easy to discern any good reason why it should not be thus limited; since, where the

[* 96] * demise is by deed, another remedy is provided, applicable to the contract.

If the plaintiffs therefore would claim the rent in arrear, under the assignment of the reversion by *John Austin*, it must be recovered in an action of debt or covenant; provided the lease were by deed, as we understand the fact to have been, although it is not so expressly stated by the parties.

We will now consider whether the plaintiffs can maintain their action as heirs at law of *Anne Austin*. It is true their title appears to be paramount to that of *John Austin*, under whom the defendant holds; and in a real action, they might doubtless recover the land. But as they have never entered, or made any claim as heirs, previous to the bringing of the present action; as the defendant has never promised to pay them rent, or occupied by their permission; and as there is no privity of contract between him and them, as heirs; it is very clear that they cannot recover rent by virtue of their title from *Anne Austin*.

For *indebitatus assumpsit* for rent will not lie in favor of a stranger, for the purpose of trying his title; or by one of two litigating parties, claiming the land; this action not depending on the validity of the plaintiff's title to the estate, but on a contract between the parties, either express or implied. On this principle it is, that the defendant, in such action, is not allowed to plead *nil habuit in tenementis*; for he shall not dispute the title of him by whose permission he occupies. The defendant, however, in the case before us, has ever occupied under his lease; and he has a right to defend his possession by that title as well as he can, however defective it may be. The law will not imply a promise which may deprive him of this right.

There is another fact in this case, which ought not to be over-

(6) 2 *D. & E.* 479, *Foster* vs. *Allanson.* — *Cro. Eliz.* 242, *Reade* vs. *Johnson* *Ibid* 859, *Clerk* vs. *Palady.*

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looked, and which makes the application of these principles the more necessary to the attainment of justice.

The defendant has been quietly in possession of * the [* 97] land, under the lease from *Austin*, for many years; he has erected buildings thereon, and made improvements. If, then, the plaintiffs should evict him, as they may, they would be held to pay for the buildings and improvements, or to abandon the land at an appraised value, by the act of 1807, c. 74. But if they could recover in this form of action, they might be entitled to rent for the buildings as well as the land; for, claiming as heirs, they would not be bound by the lease, or be limited to the rent therein reserved.

On both grounds, therefore, the plaintiffs seem to have misconceived their action; and, according to the agreement of the parties, a nonsuit must be entered.

After the foregoing opinion had been pronounced, *Ward*, who was originally of counsel for the plaintiffs, but was absent when the cause was argued at the last March term, stated that, having relied on the fact that the statute of 4 and 5 *Anne* had been adopted in this state, and believing that evidence of a promise to the grantor of the plaintiffs would be equivalent to a promise to them, he had agreed to the statement, that no express promise had ever been made to the plaintiffs, although he knew to the contrary at the time of making the statement. He had been led into the opinion that *assumpsit* would lie without proof of an express promise to the reversioner, by the two cases of *Moss* vs. *Gallimore* and *Birch* vs. *Wright* And if it was now the opinion of the Court that evidence of such a promise would alter the result, he asked leave to move that the statement of facts be discharged, and the action stand for trial, that he might have opportunity to introduce evidence to that effect.

Upon this motion for the plaintiffs, the decision of the Court was pronounced by

JACKSON, J. Before the statute of *Geo.* 2, c. 19, debt or covenant was the only remedy for rent. *Indebitatus assumpsit* would not lie for arrears of rent. * *Cro. Eliz.* 242. Nor [* 98] *assumpsit* in consideration that the plaintiff would permit, &c. *Cro. Eliz.* 859. These two cases were cited by Judge *Wilde* in the opinion delivered by him in this cause. That statute is expressly confined to cases where the agreement is not by deed. We had found no case of *assumpsit* maintained under the statute, where

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the agreement was by deed; and all the text-books and digests, which treat on this subject, mention this as a material circumstance We were therefore not a little surprised to hear it said, in support of the motion now under consideration, that *assumpsit* was maintained in the *English* courts, where the demise was by deed, and that the case of *Birch* vs. *Wright* was an authority to that point.

That case is found, on examination, so far as it applies to this question, to be rather an authority for the opposite doctrine. In the first place, the demise there was not by deed. This appears in the statement of the case, and the circumstance is mentioned or referred to by both the judges, who give their opinion in the case. So that the case is not an exception to the general current of the authorities since the passing of the statute. In the second place, *Ashurst*, J., seems to mention this circumstance particularly, as the reason why this action for use and occupation may be maintained; thereby confirming the opinion which we had adopted from all the other cases on this point.

The case of *Moss* vs. *Gallimore*, which was also cited, is to another point altogether — the respective rights of a mortgagee and a lessee of the mortgagor. The action was trespass by the lessee, for a distress taken by the mortgagee, in which this question could not come up.

We are therefore confirmed in the opinion before expressed, and entirely satisfied, that *assumpsit* for use and occupation will not lie where the demise and agreement are by deed. And as to this point, the facts agreed appear to be stronger for the defendant than they were at first supposed. For we find the parties
[* 99] * speaking of a *covenant* by the defendant to pay the rent; from which we understand that the demise was by indenture, or that the defendant had, in some manner, expressly covenanted to pay the rent.

As to the proposal to prove an express promise to pay to the plaintiffs, no authorities have been cited to show that such a promise would alter the nature of the remedy. If the obligee in a bond should call on the obligor for payment, and the latter should promise to pay at a future day, it was never supposed that the obligee could maintain *assumpsit* on this promise. There is, indeed, a case in 2 *D. & E.* 479, which was referred to by Judge *Wilde*, in giving the former opinion of the Court, where, on the dissolution of a copartnership, the accounts between the copartners were settled, including some matters not relating to the copartnership, and the defendant made an express promise to pay the balance of that account. It was held that *assumpsit* would lie on that promise, notwithstanding the defendant was bound by covenant, in the

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articles of copartnership, to adjust and make a final settlement at the expected expiration of the copartnership; and *Buller*, J., was of opinion that, if no other articles had been introduced into the account, still the plaintiff might have maintained *assumpsit* on the promise to pay the liquidated balance; and he so ruled in another case at *nisi prius*.

But there is a material difference between the promise in those cases, and a mere naked promise by one who is indebted on a specialty, that he will pay the sum due on the specialty. When an account is stated and settled by the parties, the items claimed and allowed respectively are, or ought to be, described with as much accuracy as is usually required in a declaration; or at least so far that it will always distinctly appear what the parties have respectively paid and received, as fully as if an action had been brought for each item. The settling of such an account is also in nature of an accord and satisfaction. One item is set off against another, and the whole are settled by mutual * consent, [* 100] leaving a new debt, *viz.*, the amount of the balance, growing out of the whole of the transactions included in the account. If one party should be required to bring an action of debt or covenant for any one item in the account, it would alter the balance, and thus defeat the adjustment, which the parties had deliberately made, and by which they had mutually bound themselves.

But we can perceive no principle on which a mere promise, unconnected with any other transaction, would entitle the plaintiffs in this case to maintain *assumpsit*, which would not equally apply to the case before put, of such a promise by the obligor in a bond, or by a party indebted on any specialty whatever.

The principle on which we proceed is not a mere technical rule; and were it not supported, as it is, by the whole current of authorities relating to the point, we should be inclined, from considerations of equity, to adopt it in this case, if it could be done without violating established rules. The defendant has a title to this land during the life of *John Austin*. That title may be defeated by the plaintiffs; but, as was observed by my brother in the former opinion of the Court, it cannot be done without a reasonable allowance to the defendant for the buildings and improvements that he has made upon the land. He may be willing to pay the rent to the plaintiffs, if they will admit his title for the residue of his term; and, indeed, he could not object to it, if they would confirm the demise to him by bringing an action of debt founded upon it. But if the plaintiffs could recover, as on a parol demise by themselves to the defendant, the latter would, perhaps, be estopped afterwards, to deny that he held under such a demise; and, of course, he might

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be ousted, whenever the plaintiffs should think proper to determine the supposed lease by parole.

We may add, further, that if the plaintiffs have, as we understand from the statement of facts, lost their right of entry, if they should bring a writ of entry as heir of *Anne Austin*, and evict [*101] the defendant, they could *not afterwards recover these rents in any form of action. Not in trespass for mesne profits, because their right of entry is gone. This point was settled in the case of *Cox & Al.* vs. *Callender*, 9 *Mass. Rep.* 533, and is the established doctrine of the common law; not in debt or *assumpsit*, for that would be to suppose that the defendant held under the plaintiffs, or by their permission, when, by the writ of entry, they had considered them as holding adversely under *John Austin*, who entered by abatement, after the death of their ancestor.

In short, if the plaintiffs have lost their right of entry, they have now two courses, and only two, to pursue in this case. They may disaffirm the lease made by *John Austin*, and recover the land by virtue of their paramount title as heirs; or they may affirm that lease, and recover the rent due upon it, as assignee of the lessor. But they cannot take a middle course, affirming the lease for the purpose of recovering the arrears of rent, and then disaffirming it for the purpose of ousting the lessee.

Plaintiffs nonsuit.

THOMAS DARLING *versus* JESSE CHAPMAN AND ANOTHER.

Of the pleadings in a writ of entry upon a mortgage.

Where the condition of the mortgage was that the mortgagor should pay $300 in carpenter's work, and $300 in painting, on demand, the mortgagee giving twenty days' notice, and the mortgagor pleaded payment of all but $261 15, and readiness to pay in painting and stock the residue, but that the plaintiff had never requested payment; and plaintiff replied a request 11th December, 1812, and defendant rejoined a tender and offer to pay in painting on the 16th of the same December, but that the plaintiff waived the payment, and refused to receive payment, and would not suffer the defendant to perform the work; on demurrer, held, that both this plea and the rejoinder were insufficient in law. And a second plea of *omnia performabit* having also been pleaded, and the plaintiff having replied non-payment of the $300 in painting and stock, and the defendant having demurred, held, that the replication was sufficient. — ED.]

THIS was a writ of *entry sur disseisin*, in which the demandant counts upon a mortgage deed from the tenants to one *Stephen Blake* in fee, an assignment of the premises to the demandant, and

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a disseisin by the tenants. Upon oyer had of the mortgage, the condition was, "Provided, nevertheless, that if the said *Jesse Chapman* and *Peter Mair*, their heirs, &c., pay to the said *Stephen Baker*, his heirs, &c., the sum of 600 dollars in carpenter's work, at the rules of work, and 300 dollars in carpenter's work and stock at the rules, and the sum of 300 dollars in painting and stock, at the rules of work, and interest on the whole from date, *on demand, he giving twenty days' notice*, then this * deed, [*102] as also three certain notes of hand bearing even date, &c., shall be void." Dated the 31st of May, 1808.

The defendants plead, in bar, that, at the commencement of the action, they had paid all the said sums except 261 dollars 15 cents, and that they had always been ready to pay that sum in painting work, whenever thereto requested; but that the demandant had never, before the commencement of this action, requested or demanded of them, or either of them, to pay the same in painting work and stock, according to the true intent and meaning of the said condition.

The demandant, in his replication, avers a demand on 11th of December, 1812, of the said *Mair*, to pay the said sum in painting work and stock.

The tenants, in their rejoinder, allege that, on the 16th of the same December, the said *Mair*, for himself and the said *Chapman*, was ready, &c., and offered, &c., but that the demandant waived the said request, and refused to receive the said sum, or any part thereof, in painting and stock, or to suffer them, or either of them, to perform the said work and find the said stock.

To this rejoinder the demandant demurs generally, and the tenants join in demurrer.

In a second plea in bar, the tenants plead *omnia performaverunt*. The plaintiff replies, that they have never paid the said sum of 300 dollars in painting work and stock, as mentioned in the said condition. To this replication the tenants demur, and for causes of demurrer, suggest that no demand is therein alleged to have been made, nor is it alleged that the demandant gave twenty days' notice, &c. The demandant joins in demurrer.

No argument was had, and the opinion of the Court was delivered by

WILDE, J. This is an action brought by the assignee of the mortgagee against the mortgagor; and the first question to be determined is, whether the rejoinder of the tenants, in the first set of pleadings, be well pleaded. [Here the judge recited the pleadings.] And whether * this rejoinder be a de- [*103]

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parture from the bar or not, depends on the construction to be given to the rejoinder, as to the waiving of the demand.

If we are to understand that this is alleged to have been by the mutual consent of the parties, then the rejoinder is free from objection. For if the matter in the rejoinder fortifies the bar, it is no departure. As in trespass for taking a horse, if the defendant justify for a distress damage feasant, the plaintiff may reply that the defendant afterwards used the horse, which shows that he was a trespasser *ab initio*. (1) Now, it must be recollected that the demand or notice required, in this case, was to be a subsisting demand for twenty days; and if, within the twenty days, it was waived by mutual consent of parties, it may be treated as a nullity.

But if we understand the rejoinder in the sense probably intended, and which is the most obvious, namely, as an allegation of a tender or offer to pay by the tenants, within twenty days after the notice set forth in the replication, and a refusal by the demandant, then the matter in the rejoinder is clearly a departure from the bar. For the bar denies any demand or notice on the part of the demandant, and the rejoinder admits it, making it the basis of a tender, or *quasi* tender, by the tenants, and a refusal by the demandant; which denial and admission are manifestly inconsistent, and cannot stand together.

Supposing, however, that the rejoinder is to be understood in the sense first mentioned, and so free from objection; we shall be then brought to the consideration of the plea in bar; and if that be insufficient, the demandant must still prevail; and we have no doubt that the plea in bar is bad.

The mortgagee's estate and right to possession continue until the full and complete performance of the condition, or a tender equivalent thereto. The plea shows only a performance in part, which cannot defeat the demandant's estate; and is a bar only to a conditional judgment under the statute, and should have [* 104] *been so pleaded. Or, if the tenants could prove a tender and refusal, as to the 261 dollars 15 cents, it should have been alleged in the plea in bar, which would have been sufficient to defeat the demandant's estate. For if A borrows money of B, and afterwards mortgages land to B, with condition for the payment thereof, and A tenders the money, and B refuses to accept thereof, the land is discharged, although the debt may remain. (2)

But in the case at bar, the plea does not allege performance of

(1) *Chitty on Pleadings*, 622. — *Com. Dig., Pleader*. F. 11.
(2) *Co. Lit.* 209. — 1 *Roll.* 457, 458, 463, 467. — *Powell on Mortgages*, 7, 8.

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the condition, nor a tender and refusal. Nor can this deficiency be supplied by matter in the rejoinder; or if it could, still, in the sense in which, in such case, it must be taken, the rejoinder would be bad as a departure, for the reasons before given.

The question, as to the second set of pleadings, depends on the sufficiency of the replication; against which the objection seems to be, that it contains no assignment of a breach of the condition of the mortgage deed, and this would be a valid objection in an action of *assumpsit* on the notes, or on an agreement in the words of the condition.

But in an action on the deed, the mortgagee is not required to show a breach of the condition, unless his object be to foreclose by means of a conditional judgment. The replication must therefore be held good; and the demandant must have judgment for possession at common law. His title, however, will still remain liable to be defeated by the performance of the condition, or by a tender and refusal; after which the mortgagors will have a right to enter, and to be reinstated in their former estate.

[* 105]

* THOMAS DAWES, Judge, &c., *versus* SAMUEL SWEET AND OTHERS.

An action lies upon an administration bond where this Court have adjusted the administrator's account upon an appeal, and have ordered a balance paid over.

DEBT on an administration bond. After oyer of the bond and condition, the defendants plead performance generally. The plaintiff replies a decree of this Court, as the Supreme Court of Probate, ordering a balance in the hands of the administrator to be paid over to the person entitled, and avers that the same has never been paid, and that the decree is still in force.

Upon demurrer to this replication, *Aylwin*, for the defendants, contended that the condition of the bond did not apply to a decree of this Court; and he insisted that the practice had been, in cases of appeal in probate causes, after a hearing in this Court, to remit the proceedings to the judge below, for him to enter a decree, conformed to the opinion given here. He also objected to the replication, that it contained no averment of a demand and refusal.

Rowe, for the plaintiff, argued that it was absurd to remit the proceedings when the decree in question made a final adjustment

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of the whole estate; and he insisted that a decree of this Court was within the words of the condition of the administration bond. He suggested, also, that a demand had been repeatedly made on all the defendants, although, in his hasty draught of the replication, he had neglected to allege it.

The Court were very clear that an action on the bond will lay, to enforce a decree of this Court rendered upon an appeal. But as a demand was necessary to be averred and proved, they gave leave to the plaintiff to amend his replication, by inserting such an averment; and to the replication thus amended the defendants might rejoin or demur, as they should be advised.

[* 106]

* DAVID HIGGINS *versus* EDWARD S. LIVERMORE.

Insurance was made "on the cargo of the *Swedish* brig *Sophia*," and it was holden that the vessel was thus warranted to be *Swedish*, or at least documented in that character.

CASE upon a policy of insurance. The article insured was described as "the plaintiff's commissions on the cargo of the *Swedish* brig *Sophia*."

It was proved, at the trial before *Jackson*, J., at the last November term in this county, that the vessel was captured by the *British* on the voyage insured, and with the cargo condemned, on the ground that she was not a *Swedish* vessel; and the only question was, whether she was warranted by the policy to be *Swedish*. The judge was of opinion that, by the words above quoted, she was so warranted; and no evidence was offered to prove that she was *Swedish*, or that she was documented as such. But the plaintiff contending that this was not the legal construction of the policy, and offering to prove by parol evidence that it was not so understood and intended by the parties, the judge admitted the evidence, in order to present the whole question at once for the consideration of the Court. Upon the evidence thus admitted, the jury returned their verdict, that the plaintiff did not warrant that the vessel was *Swedish*, and accordingly found for the plaintiff as for a total loss.

The defendant moved for a new trial, alleging that the verdict was against the weight of evidence, on the point submitted to the jury. If the Court should be of opinion that the parol evidence ought to have been admitted, and that the plaintiff was entitled to

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recover in the action, the verdict was to stand. Otherwise it was to be set aside, and a new trial ordered; as the plaintiff alleged that he should, upon another trial, be able to prove that the vessel was *Swedish*, or that she was regularly documented as such.

* *By the Court.* The words cited from the policy [* **107**] contain a warranty that the vessel was *Swedish* property, or at least that she was furnished with regular documents in that character. The evidence given to the jury, to explain the intentions of the parties to the contract, ought not to have been admitted.

The condemnation having been expressly on the ground that the vessel was *American*, it is doubtful if the plaintiff is at liberty to contest that fact. But let the verdict be set aside, and the plaintiff may take a new trial, if he shall be so advised. (1) (*a*)

Parker for the plaintiff.

Welsh for the defendant.

(1) See 8 *Johns. Rep.* 307, *Barker* vs. *Phœnix Ins. Co.*, and the cases there cited.

(*a*) [*Atherton* vs. *Brown*, post, 152. — *Lewis* vs. *Thacher*, 15 *Mass. Rep.* 431. — *Hastings* vs. *Lovering*, 2 *Pick.* 214. — *Hogins* vs. *Plympton*, 11 *Pick.* 100. — *Windsor* vs. *Lombard*, 18 *Pick.* 57. — ED.]

WILLIAM S. SKINNER *versus* NEHEMIAH SOMES, JUN.

Debt does not lie for the assignee of a bond, in his own name, against the obligor.

THE plaintiff declared in debt upon a bond made by the defendant to one *John Somes*, his heirs, executors, administrators, or assigns, and upon an assignment thereof by the said *John* to the plaintiff; and avers notice to the defendant, and a demand and refusal.

The defendant demurs generally to the declaration, and the plaintiff joins in demurrer.

Townsend, for the plaintiff. Courts of law have become more liberal in later times in supporting and protecting the rights of assignees of *choses in action*. In *Tuttle* vs. *Bebee*, (1) the assignee of a bond was allowed to set it off in an action of *assumpsit* by the obligor against him. In *Mowry* vs. *Todd*, (2) this Court sustained

(1) 8 *Johns.* 152.

(2) 12 *Mass. Rep.* 281. See, also, 2 *W. Black* 1269, *Fenner* vs. *Mears*.

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an action on a contract not in its nature negotiable, in the name of the party to whom it had been delivered over without the name of the assignor, the party bound having recognized the transaction, and promised to pay the contents to the holder. (3) The word *assigns* in the bond amounts to a consent, on the [* 108] * part of the obligor, that the bond should be transferred, and an engagement to pay to the assignee. Many cases in the books, prior to the statute of 4 *Anne*, c. 9, show actions maintained by assignees of *choses in action*. (4)

Reed vs. *Ingraham* (5) was an action by the assignee of a stock contract, to recover the amount of the difference due on the contract, and was maintained by the Supreme Court of *Pennsylvania*, notwithstanding it is said by the Court, that, on general principles of law, such contracts cannot be regarded as negotiable; yet *modus et conventio vincunt leges*. And on a motion afterwards for a new trial, the judges cited the case of *Fenner* vs. *Mears*, and the argument of *Buller*, J., in *Master* vs. *Miller*, (6) and adhered to the opinion before given. (7) It is said, in *Bac. Abr.*, *Debt*, *C*, that there is no case where a thing may be transferred or assigned over, but the remedy shall go along with it. If the word *assigns* in this bond are not tantamount to *order*, it can have no force or meaning attached to it.

Sohier for the defendant.

By the Court. This is the first attempt to maintain an action of debt by the assignee of a bond in his own name. The word *assigns* has been for centuries inserted in bonds and obligations; but no one has conceived that it gave to them a negotiable property, so as to transfer the right of action upon them to the assignee. In *Fenner* vs. *Mears*, the action was *assumpsit* upon the promise of the obligor to pay to the assignee; and the assignment of a *chose in action* was always a good consideration for a promise.

We have gone as far in favor of assignments as the authorities or the reason of them would justify us. But to support the present action would be to disregard settled and established rules, founded on sound principles of law, and the highest reason. (*a*)

Declaration adjudged bad.

(3) 1 *Cranch*, 428, 439.
(4) 1 *Salk.* 125. 132. — 3 *Salk.* 67. — 12 *Mod.* 380.
(5) 3 *Dallas*, 505.
(6) 4 *D. & E.* 341.
(7) See 8 *D. & E.* 595, *Innes* vs. *Dunlop*.
(*a*) [*Day* vs. *Whitney*, 1 *Pick.* 503. — *Dunn* vs. *Snell & Al.* 15 *M.* 481. — ED.]

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*JOSEPH INGERSOLL *versus* JOSEPH JACKSON.

Where a *bona fide* purchaser of a vessel could have successfully defended and claimed against a forfeiture thereof for a breach of the embargo laws, committed before the sale, and on this ground the vendor was held not to be liable in damages to the purchaser, on the covenant against encumbrances, on the condemnation of the vessel, it was also holden, that the absence from the *United States* of both the parties, from the sale to the condemnation of the vessel, did not excuse the purchaser from his obligation so to defend and claim, or give him a better title to damages for the breach of such covenant.

THIS action was again tried at the last November term, before *the Chief Justice*, upon the plea of the defendant that he had kept his covenants; and a verdict was returned for the defendant by consent, the law being reserved for the Court upon the facts before reported, (for which see vol. xiii. p. 182,) with this addition only, that, at the time of the purchase of the vessel, *Ingersoll* and *Jackson* were both absent from the *United States*, and continued absent until after the seizure and condemnation of the sloop *Julia*. And if, upon the whole law, the verdict ought to have been for the plaintiff, this verdict was to be set aside, and a verdict entered for the plaintiff, for the damages found by the jury on the former trial, with interest; otherwise judgment was to be entered for the defendant upon the verdict returned at the last trial.

Welsh, for the plaintiff, contended that the new fact disclosed at the last trial entitled the plaintiff to a verdict. Being out of the country at the time of the seizure, it was impossible for him to have filed a claim, had he known of the previous offence. As he was wholly ignorant of that fact, no laches are imputable to him for not constituting an agent, who might have claimed for him in his absence. He could not be held to anticipate or provide against an event, of the cause of which he was wholly ignorant. But he was under no obligation to claim, unless the defendant had furnished the necessary documents, and stipulated to indemnify him for the expenses which would have attended such claim.

But it appears, from some late decisions of the Supreme Court of the *United States*, which must be held to be conclusive on this subject, that, had the plaintiff instituted a claim for the *Julia*, he could not have been *successful. A *bona fide* [*110] purchaser is not protected from a forfeiture for a previous offence. (1)

Prescott for the defendant.

(1) 7 *Cranch's Rep.* 113, *U. S.* vs. *Brig Eliza.* — 8 *Cranch*, 398, *U. S.* vs 1967 *Bags of Coffee.* — *Ibid.* 417, *U. S.* vs. *Brig Mars.*

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PUTNAM, J., delivered the opinion of the Court. The additional fact now inserted in this case, that the parties were both absent from the *United States* when the purchase of the vessel was made, seems to us immaterial, and not an excuse for any omission to defend the vessel against all unlawful claims. The defendant warranted only against lawful claims; not against tortious acts. The plaintiff should have appointed some agent to attend to this concern, or sub mit to the loss occasioned by his own laches.

It has been contended, however, for the plaintiff, that, since the former decision of this cause, two cases have been determined by the Supreme Court of the *United States*, having a material bearing on the case at bar, and proving the incorrectness of our former decisions.

Those cases are *U. S.* vs. *The Brig Eliza*, 7 *Cranch*, 113, and *U. S.* vs. 1960 *Bags of Coffee*, 8 *Cranch*, 398. We have examined these cases.

The first was a proceeding upon the third section of the embargo act of 9 January, 1808; (2) and the *Julia* was seized for a violation of that act. The provision is, that, for the offence described, such vessel shall be wholly forfeited; "and if the same shall not be seized, the owner or owners, agent, freighter, or factors, of any such ship or vessel, shall forfeit and pay for every such offence a sum equal to double the value of the ship or vessel and cargo," &c. The point decided in the case was, that she was liable to seizure upon her return to the *United States* from a foreign port, notwithstanding she had been out of the jurisdiction of the *United States*, and notwithstanding the election given to seize or prosecute for the double value.

But it does not appear that there had been any sale of the *Eliza*. The original owner claimed on the ground that the words in the act, "and if she shall not," were equivalent to "if she [*111] cannot," be seized; *and that, when the ship was beyond the jurisdiction of the *United States*, she could not be seized, and therefore that the *United States* had only a remedy by a prosecution for the double value. But the Court, with great reason, decided that the *United States* had not lost their right to seize because the ship had been out of their jurisdiction.

In that case, the claimant was the original offender and owner; in the case at bar, the plaintiff might have claimed as an innocent purchaser for a valuable consideration. In that case, the vessel was seized before any transfer of the property had been made; in the case at bar, the plaintiff purchased fairly before the *United States* seized, and he was ignorant that the vessel had ever offended.

(2) *U. S. Laws*, vol. ix. p. 11.

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The other case relied upon, *The U. S.* vs. 1960 *Bags of Coffee*, was upon the non-intercourse act of 1 March. 1809, (*U. S. Laws*, vol. ix. p. 243,) upon an allegation that the coffee was imported into the *United States* contrary to that act. The provision in such case is, that the goods "shall be forfeited." There is no election given to the *United States* to seize the thing or to recover a penalty, as in the embargo act; and a majority of the judges of the Supreme Court of the *United States* were of opinion that the words of the act were imperative, and excluded the common law rule, which fixes the title on conviction, and vested the title in the *United States* on the commission of the offence. Upon this principle, a *bona fide* sale to a purchaser, without notice, after the commission of the offence, and before seizure, was held void, notwithstanding the owner had obtained a permit for the landing of the goods, and had secured the duties.

That case is like the *U. S.* vs. *The Brig Mars*, which was cited in the hearing of this cause at the last term, and has since been published in the eighth volume of *Cranch's* Reports. And it must be constantly recollected that the Court felt bound by the positive words of the act, and that no alternative is given, as there is in the embargo act, for the violation of which the *Julia* * was seized. Upon this distinction we grounded our [* 112] opinion at the last term; and, upon reconsidering it, we are satisfied with it.

The act has no limitation of time within which the *United States* must seize. This, perhaps, is well enough, so far as respects the property while in the hands of the original offender; but it would operate with great injustice upon honest purchasers.

If the title was to be considered as vested on the commission of the offence, the remedies would, in effect, be cumulative, and not alternative and contingent; which would be doing violence to the words of the act. Upon the construction contended for by the plaintiff, the vessel might be as well seized in the hands of the fiftieth as of the first purchaser; and no man would be safe in buying or selling, notwithstanding years had elapsed since the alleged offence, and notwithstanding the *United States* had not manifested any intention of seizure until after the last sale. As such a construction of the statute is not necessary, and would lead to most inconvenient consequences, we do not adopt it. Let judgment be entered for the defendant, according to the verdict.

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NATHANIEL SMITH *versus* ABRAHAM TOURO.

A vessel, being *American* property, but having an ostensible *Spanish* owner and master, was insured from the *Havana* to the *U. S.* In case of a loss, no proof of property was to be required, and no return of premium; and the assured agreed, in case of capture, to claim the property as *Spanish*. The vessel was captured and libelled as prize, but was finally restored. While she was under detention, the assured abandoned. After the restoration, the ostensible owner, instead of proceeding with the vessel to the *U. S.*, fraudulently took her on another voyage, without authority. It was holden, that the under writers were not liable for the loss.

ASSUMPSIT on a policy of insurance, dated February 8, 1814, whereby the defendant insured for the plaintiff 600 dollars on the brig *Maria Francisca* and cargo, at and from the port of *Havana* to *Boston*, or port of discharge in the *United States* not blockaded. The policy was in the usual form, except an agreement that, in case of loss, no proof of property was to be required, and no return of premium; and in case of capture, the assured agreed to
[* 113] claim and prosecute for the property as * *Spanish*, until acquittal or condemnation in a high Court of Admiralty, the underwriters and assured agreeing to pay their proportion of expenses in such case. The plaintiff declares as for a total loss by capture.

The cause came before the Court upon an agreed statement of facts, to the following purport and effect, *viz.*: —

The plaintiff was interested in the vessel insured to the amount of his insurance, and the defendant subscribed the policy to the amount stated in the declaration, at a premium of fifteen per cent.

The vessel proceeded on the voyage insured, and was captured by a *British* vessel of war, carried to *Halifax*, and there libelled as a prize.

On the 11th of July, 1814, and while the vessel was in possession of the captors at *Halifax*, and under process of the Admiralty Court of that place, the plaintiff abandoned, in due form of law, to the underwriters and to the defendant his interest insured in the vessel.

On the 19th of the same July, pursuant to the claim made by the master of the vessel in the said Admiralty Court, the vessel was restored, on the payment of expenses; and the proportion of the said expenses attached to the vessel was 452 dollars 40 cents.

The plaintiff had no interest in the cargo, and claimed no loss on account thereof.

After the restoration of the vessel, the ostensible *Spanish* owner

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and master put on board her a cargo, and proceeded to the *West Indies*, without the consent, sanction, or authority of any one.

Williams, for the plaintiff, contended that, an abandonment having been duly made while the vessel was under detention by a hostile capture, a right vested to recover as for a total loss. The abandonment changed the property, and by it the nominal owner and master became the agent of the underwriters, who must suffer the effects of their fraudulent conduct. (1)

Welsh, for the defendant, cited 2 *Caines's Rep.* 286.

PUTNAM, J., delivered the opinion of the Court. This was a case where the assured, an *American*, was [*114] the real, but a *Spaniard* was the ostensible, owner of the ship, which was the subject of the insurance. The assured, in case of capture, undertook to claim as for *Spanish* property, and he made a successful claim. The ship was restored to the ostensible owner; but he afterwards employed her in a voyage which the assured never contemplated: he betrayed the trust reposed in him, and converted the property to his own use.

It has been argued, for the plaintiff, that, having abandoned when the ship was in the hands of the captors, the property vested in the underwriter, and he is answerable for it.

But did the abandonment change the property? It was undoubtedly made for a sufficient cause, and in a reasonable time. The ship was under detention. But as this was temporary, and it does not appear that she sustained any damage while in the possession of the enemy, the plaintiff is not entitled to recover for a total loss on that ground. (*a*)

If, as has been contended, the ostensible owner became the agent for the underwriters, after the restoration, the defendant would be answerable for a total loss, in the same manner as if he had himself received the property. But the ostensible owner was not the agent of the assurers, but of the assured. The defendant undertook that the ship might pursue her voyage in safety as a *Spanish* vessel, and that, if she should be captured, she should be restored.

(1) 3 *Mass. Rep.* 238, *Lee* vs. *Boardman.*

(*a*) [This decision cannot easily be reconciled with the doctrine generally received, in the *United States* at least, that the state of things at the time of the offer to abandon fixes the rights of the parties, (*Rhinelander* vs. *Ins. Co. Pennsylvania*, 4 *Cr.* 29. — *Marshall* vs. *Delaware Ins. Co.* 4 *Cr.* 202. — *Dickey* vs. *American Ins. Co.* 11 *Johns* 358. — *Jusnel & Al.* vs. *The Mar. Ins. Co.* 7 *Johns.* 412,) and that, by the abandonment, rightly made, the insurers become the owners of the property, and the master becomes their agent. — *Coolidge* vs. *The Gloucester Ins. Co.* 15 *Mass. Rep.* 346. — *Scheffelin* vs. *New York Ins. Co.* 9 *Johns.* 26. — *Brig Sarah Ann*, 2 *Sam.* 210. — *Peele* vs. *The Suffolk Ins. Co.* 7 *Pick.* 254. — *Hall* vs. *The Franklin Ins. Co. Pick.* 466. — *Lovering* vs. *The Merc. Ins. Co.* 12 *Pick.* 348. — ED.]

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upon a claim being made for her as *Spanish* property. The precise event has happened.

The loss has occurred to the assured by reason of the fraud of the ostensible owner. Suppose that he had proceeded from the *Havana* to *London*, instead of *Boston*, according to the voyage insured, would the underwriter be answerable? It could not have been for the barratry of the master; because he was bound to obey the orders of the owner, and the underwriter would have been discharged in such a case by the deviation. In short, the [*115] assured has sustained a loss, not from any of * the perils in the policy, but from the act and fraud of one whom he trusted, and for whom the defendant is not answerable.

Plaintiff nonsuit.

CORNELIUS COOLIDGE AND ANOTHER *versus* SAMUEL CARY.

Bail may surrender the principal in court by attorney.
After a defendant is defaulted, judgment is entered of course, unless there be good reason for postponing it, as a prior attachment of property by other creditors.

THE defendant's bail, by *J. T. Austin*, his attorney, offered to surrender him into the custody of the Court, to discharge himself of his suretiship.

It was objected by *Aylwin*, for the plaintiffs, that this could not be done by attorney; but the Court overruled the objection, and the surrender was made.

The defendant having afterwards been defaulted, his counsel moved that judgment be entered as of that day of the term, with a view that the thirty days might commence, within which the plaintiffs must charge him in execution, or he be discharged from his imprisonment.

Aylwin. The plaintiffs do not move for judgment.

By the Court. After the default of the defendant, judgment goes, of course, unless there be good reason for postponing it, as where there is a prior attachment of property. There is no sufficient reason for delay in the present case.

Let judgment be entered.

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* FRANCIS STANTON AND ANOTHER *versus* BENJAMIN BLOSSOM AND ANOTHER.

Where the drawer of a bill of exchange had effects in the hands of the drawee, but after the bill was drawn, and before it was presented for acceptance, the effects were attached in the hands of the drawee, the drawer was still held entitled to notice of the non-acceptance.

Such notice is sufficient, if given within a reasonable time, although the holder commences his action against the drawer, on the non-acceptance of the bill, before forwarding the notice.

But the notice must come from the holder of the bill, or from one authorized by him, or from one liable as endorser. Notice by the drawee, who has refused acceptance, is not sufficient.

ASSUMPSIT on a bill of exchange, drawn by the defendants, merchants at *New York*, for value received, in favor of *E. D. Comstock*, also of *New York*, on *White & Andrews*, merchants of *Boston*, for 700 dollars, payable at thirty days' sight, dated at *New York*, May 13, 1810, and endorsed by *Comstock* to the plaintiffs.

Trial was had on the general issue, at the last November term before *the Chief Justice.*

The bill was presented in the morning of the 16th of May, the day of its arrival by mail, and was refused acceptance; the drawees stating that they had been served with a foreign attachment in favor of *Howland & Burns*, who were creditors of the defendants to a greater amount than the funds in their hands.

On the same morning, and within an hour after the opening of the mail from *New York*, the plaintiffs commenced the present suit, and attached property.

White & Andrews, the drawees, wrote to the defendants, by the mail of that day, informing them that they had refused to accept their bill in favor of *Comstock*, and stating the reasons for their refusal.

It was admitted, at the trial, that no notice was ever given by the plaintiffs themselves to the defendants themselves, of the non-acceptance of the bill, or of the plaintiffs' intentions to resort to them for payment. The only evidence on this point was contained in the deposition of one *Rogers*, testifying to a conversation between the defendant *Blossom* and *Comstock*, the payee of the bill, in July, 1816. *Comstock* inquired if *Blossom* had not received due notice of the non-acceptance * of the draft [* 117] on *White & Andrews*; to which *Blossom* answered, that it was so long since the transaction, that he could not recollect, but he presumed he had; that his letter-book would show; but that he had received information from *Comstock* and others. Being asked

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whether he had funds in the hands of *White & Andrews*, to the amount of the draft, *Blossom* answered, that he had in property, but not realized.

No evidence was offered that the drawees acted as the agents of the plaintiffs in giving notice, nor that *Comstock*, if he gave any such notice, acted as such agent.

The drawees, at the time of the presentment of the bill to them, had property of the drawers in their hands on consignment, to a greater amount than 700 dollars; but a short time before the presentment, and on the same morning, they had been summoned as the trustees of the drawers in the manner above mentioned.

The defendants objected to any evidence of notice from the drawees, or from the payee of the bill; and contended that it was incumbent on the plaintiffs to prove notice from themselves, as the holders of the bill, to the defendants; that the testimony of *Rogers* was not sufficient to prove legal notice from the payee; and that the notice proved must be prior to the bringing of the action.

The Chief Justice overruled these objections, and directed a verdict for the plaintiffs; which was to be set aside, and a new trial granted, if the objections were well founded.

Gallison, for the defendants. Notice to the drawer of the non-acceptance of his bill is necessary in every case, except where he has no effects or funds in the hands of the drawee.

This notice, to avail the holder, must be given by him, that the drawer may know that the holder looks to him. (1)

[* 118] The notice in this case, such as it was, was not seasonable. It was not until after the commencement of * the action, and the plaintiffs can avail themselves of nothing after action commenced, which is necessary to give them a right of action. Notice is a condition precedent, on which the right of action depends. It is a necessary part of the title to the action. (2) Nothing can supply the defect of it but the single fact that the drawee has no funds of the drawer in his hands. (3) Should it be said that this rule has no application in the case at bar, because, in fact, the drawee had no funds at the time, it is answered, that the rule extends to every case where the drawer has a reasonable expectation that he has funds in the hands of his drawee. Notice is dispensed with only on the ground of fraud and imposition on the

(1) 1 *Chitty*, 180. — *Bull. N. P.* 277. — 1 *D. & E.* 170, *Tindall* vs. *Brown*. — *Kyde*, 126. — 7 *Ves. Jun.* 597. — *Bayley*, 71.

(2) *Doug.* 683. — 2 *W. Black.* 747. — 6 *Mass. Rep.* 388, *Blakely* vs. *Grant*. — *Lawes's Pleadings in Assumpsit*, 282.

(3) 3 *Esp. Rep.* 158, *Dennis* vs. *Morris*. — 1 *Esp. Rep.* 332, *Staples* vs. *Okines*. — 2 *B. & P.* 279, *Whitfield* vs. *Savage*. — 3 *B. & P.* 239, *Clegg* vs. *Cotton*.

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part of the drawer. (4) It has often been regretted, by *English* judges, that this solitary exception was ever admitted.

Savage, for the plaintiffs, contended that, if neglect to give notice be excusable in any case, it must be so here. It has been holden that the plaintiff might take the burden of showing that no damage happened to the drawer from want of notice, and of rebutting the presumption that he had funds in the hands of the drawee. Both these things the plaintiffs have done in this case. No injury could, by any possibility, have arisen to the defendants from the want of notice, since all their funds in the hands of the drawees were previously arrested by process of law.

But notice was, in fact, given in this case, and that in the best mode, if regard be had to the reason of the rule. The reason uniformly given for the necessity of notice is, that the drawer may have an opportunity to secure his funds. In this case, the notice not only informed the defendants of the dishonor of their bill, but that the funds relied on had been by the law appropriated to the benefit of other creditors, from whence they would immediately see it to be their duty to take up the bill; and by the commencement of this action, it was put beyond all doubt with them that the plaintiffs looked to them.

It seems to be settled that notice from any one, who
* is a party to the bill, is notice from all, and shall avail [* **119**]
all according to their respective rights. (5) Put the case
of a bill, with several endorsers, left in a bank for collection. The bank is agent for the holder only. On the bill's being dishonored by the acceptor, notice is given to the drawer and the several endorsers. The holder receives payment from the last endorser, who thereupon calls on the drawer: it could not surely lie in his mouth to object that this endorser had not given him notice, although some one else had.

PUTNAM, J., delivered the opinion of the Court. The first question which presents itself in this case is, whether the plaintiffs were bound to give notice to the drawers of the non-acceptance of this bill by the drawees.

It is settled that, where the drawee has no effects of the drawer, no notice of non-acceptance is necessary; and this for the reason, that the drawer had no right to draw upon one who owed him nothing.

But in the case at bar, the defendants had effects in the hands of the drawees, when they made their bill; and they had a reasonable

(4) 1 *D. & E.* 408, *Bickendike* vs. *Bollman.* — 7 *East*, 359, *Orr* vs. *Maginnis.* — 15 *East*, 220. — 16 *East*, 43, *Rucker* vs. *Hil'er.* — 1 *B. & P.* 655, *Walwyn* vs. *St. Quintin*
(5) 1 *Starkie's N. P. Rev.* 34, *Wilson* vs. *Swabey.*

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expectation that it would be paid. We are satisfied that this is a case where the drawers were entitled to notice, notwithstanding the effects were attached after the bill was drawn, and before it was presented for acceptance.

It seems, therefore, necessary to consider whether the notice, which was given by the drawees in this case to the defendants, was within a reasonable time; and if so, whether it can avail in this action, as if it had been given by the plaintiffs.

The plaintiffs commenced their suit before the letter was put into the post-office, containing information of the dishonor of the bill. But the letter was in season to go by the first mail. Now, all that is required of the holder, in case of the dishonor of a bill, is to use due diligence to give notice to all who may be affected, and to whom he intends to resort. No notice may be, in fact, received for months. The party to be notified may be in a foreign [* 120] country. No opportunity * of writing may occur soon. And after all reasonable care and endeavors, the notice may never arrive in season to be of any advantage. The ship or the mail which carries the letter may be destroyed. But the party, who has used due diligence, is not to suffer by such events. He is not bound to wait until notice has been received, before he is permitted by law to take measures for his security. In the case at bar, therefore, the notice seems to have been given in a reasonable time. (*a*)

But the point of the most difficulty remains. Shall the information communicated by the drawees avail in this action, as if it had been given by the plaintiffs themselves? It has been argued that the defendants have not been prejudiced at all; that their funds, although not appropriated according to their desire, have yet been applied to the payment of their debts; that the information, coming from the drawees, must have been as useful and authentic as could have been given. It is said, also, that the drawees are a party to the bill; and that notice from a party to a bill enures for the benefit of all. In support of this point, the case of *Wilson* vs. *Swabey* was cited and relied on. That was *assumpsit* by the endorsee against the drawer. The bill became due on Thursday; *Lewis*, an endorser, was notified on Friday, and he notified the defendant on Saturday. The objection was, that there was no notice from the plaintiff; but Lord *Ellenborough* held that notice from any person, who was a *party to the bill*, was sufficient.

But the drawee who refuses to accept is not a party, or charge

(*a*) [*Shed* vs. *Brett*, 1 *Pick.* 401. — *New England Bank* vs. *Lewis*, 2 *Pick.* 123 — ED.]

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able in virtue of a bill; and notice from him is in no degree better than from any other stranger.

More than twenty years ago, it was decided, in the case of *Tindall* vs. *Brown*, which was cited in the argument for the plaintiffs, that notice must come from the holder; and many later decisions have corroborated the rule. In a late case, in *Campbell's Reports*, (6) this point is directly decided. The holder himself, *or some one authorized*, must give the notice. Now, the *endorser, who has been notified by the holder of the dishonor of the bill, may, by reason of his liability, be considered as authorized to notify the drawer for the benefit of the holder as well as himself, both having an interest in the matter. They can and ought to inform the drawer whether he must pay the bill; and that is a material fact to be communicated to him, and which no stranger is presumed to know. The bill may not be duly honored; and the holder may be willing to accept an equivalent, or may give credit to the drawee. In such case, the drawer would be discharged. There is good sense in the rule which requires the notice to come from a party liable to be charged upon the bill, on having an interest in it; and the drawer is not to be affected by information from any other quarter. [*121]

New trial ordered.

(6) 2 *Campb.* 177, *Stewart* vs. *Kennet.*

SAMUEL HEMMENWAY *versus* GAMALIEL BRADFORD.

Where, in a policy of insurance, the underwriter acknowledges the premium paid, and the assured has afterwards a right to a return of the premium, he may recover the same in an action for money had and received; although, in truth, he gave his promissory note therefor, and the same is still unpaid.

THIS was an action of *assumpsit* upon the policy sued in the action of this plaintiff against *John Eaton*, reported, ante, vol. xiii. p. 108. The declaration in this case contained also a count for money had and received.

It appeared, from the report of the assessors appointed in that action, that the property of the plaintiff insured by the policy, on which this action was founded, was fully covered by subscriptions prior to that of the defendant. The policy was in common form, confessing the premium paid.

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A negotiable note was given by the plaintiff for the premium, which has never been negotiated, and remains unpaid; except such part of the sum due on it as has been made a set-off against losses recovered of the other underwriters upon the policy.

When the said premium note became due, it was lodged by the insurance broker in a bank for collection; but was afterwards withdrawn, upon the application of the plaintiff, at whose [*122] request the broker also *agreed to hold it, until all the suits pending on the policy should be terminated.

The plaintiff has assigned all his interest in the sum he was entitled to recover on the policy to one *Marston*.

If the plaintiff was entitled to judgment for a return of the premium upon these facts, the defendant was to be defaulted; otherwise the plaintiff was to become nonsuit.

Gallison for the plaintiff.

Welsh for the defendant.

Per Curiam. It has been repeatedly decided in this Court, that, when the assured is entitled to a return of premium, he may recover the amount in an action for money had and received, although his note given for the premium should not have been paid. The underwriter, by the terms of the policy, expressly acknowledges the receipt of the premium; and whether it was paid to him in cash, or in merchandise, or by a negotiable note, or in any other manner, the action to recover it back will still be in the same form. (*a*)

If the parties choose to agree that payment of the premium note shall not be enforced until all questions arising on the policy shall be settled, and that it shall then be set off, or deducted out of any sum due to the assured, it is very easy to introduce a stipulation to that effect in the policy. But we cannot recognize any such agreement or understanding between the parties, when it is inconsistent with the terms of their written contracts.

We see nothing in the particular circumstances of this case to take it out of the general rule. When the broker took the note out

(*a*) [In *Russell* vs. *Degrand*, (15 *Mass. Rep.* 37,) the Court say that "the acknowledgment in the policy operates as *quasi* an estoppel." But it seems to be quite clear that a parol receipt, like that contained in our policies, which are not sealed, cannot operate in any way as an estoppel; and that the action for money had and received cannot be maintained where neither money nor its equivalent has, in fact, been received. — 2 *Stark. Ev.* 2d *Lond.* ed. 62, 571, 702, 183, note (o). — *Stratton* vs. *Rustall*, 2 *D. & E.* 366. — *Lampson* vs. *Cork*, 5 *B. & A.* 606. — *Phill.* 8th *Lond.* ed. 388. — As the promissory note, in this case, had not been negotiated, on producing and delivering the same up to be cancelled, it would seem that the defendant would, according to the agreement, have been entitled to demand a nonsuit. The receipt of the assurer in the policy could not be conclusive unless, by reason of the insurance being effected through the medium of a broker, the insurer should have been accredited with the principal assured to that amount. — 2 *Stark. Ev.* 2d *Lond.* ed. p. 647 note (e). — ED.]

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of the bank, the parties might have agreed that the plaintiff should not demand a return of premium in this action, and that, if he should appear to be entitled to such a return, it should be paid by cancelling the note. But no such agreement is stated in the case; and we are not authorized to infer that any such was made.

Defendant defaulted.

[*123]

*MARY GILMAN *versus* SAMUEL BROWN AND OTHERS.

Of the rights of individual members of the *New England Mississippi Land Company*, in the fund created by the act of Congress of March 31, 1814, entitled, "*An Act for the indemnification of certain claimants of public lands in the* Mississippi *Territory*;" and of the authority of the commissioners appointed by the said act.

Where the company entered into articles to the effect that the title to the whole lands should be vested in three of their number, who were to issue certificates to each for his proportion, transferable by a blank endorsement of the name of the person to whom they should be issued, and to be complete evidence of such person's right, and the plaintiff became the *bona fide* holder of certificates thus issued to one of the company, and was admitted to be a member of the company, and to vote at their meetings; and the company authorized five directors, or any agents of the company, to convey to the *United States* the whole or any part of the land, for a consideration in money or in parts of the land, in confirmation of the title to the rest, as the parties should agree, and the directors were authorized to release the whole or any part of the lands on such terms as had been offered by the *United States*, and to require the trustees to make a sufficient deed therefor; any certificate, or other consideration, to be received by the treasurer of the company, and disposed of by the directors for the claimants, according to their respective interests, after the just claims of the company should have been discharged, and under the act of Congress, commissioners were appointed to determine upon the sufficiency of releases and assignments, and upon all such claims as might be found to conflict with each other; and after nine tenths of the land had been released, the president was to issue certificates to the several claimants, and the persons claiming were to receive indemnity in proportion to the amount of their claims, and the commissioners, upon hearing the parties, deducted the amount of stock, for the proportion of land of the original holder of the plaintiff's certificate from the amount they reported to be due to the company; — held, that the decision of the commissioners was conclusive; and that the plaintiff, and not the company, must sustain the whole loss. — ED.]

THIS was a special action upon the case founded upon a contract, the purport of which will be seen in the opinion of the Court, as delivered by the Chief Justice, upon a statement of facts agreed by the parties. The declaration also contained a count for money had and received.

PARKER, C. J. The plaintiff's right to recover in this action

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depends upon a supposed obligation, on the part of the defendants, to deliver to her a certain portion of the stock of the *United States*, created by virtue of an act of Congress, passed the 31st of March, 1814, providing for the indemnification of certain claimants of public lands in the *Mississippi Territory*. The defendants are the directors of an unincorporated association of individuals, who contracted with *Amasa Jackson* and *William Williamson*, the agents of the *Georgia Mississippi Company;* which company had purchased of the state of *Georgia* a part of that large tract of land which has so long been in dispute, on account of an alleged fraud in obtaining the title from the legislature of that state.

The company, of which the defendants are the directors, associated, in the year 1796, under the name of the *New England Mississippi Land Company;* and entered into certain articles of agreement, called the constitution, according to which the whole affairs of the company, respecting the land so purchased, were to be disposed and managed. Among other things, it was agreed that the legal title to the whole land purchased should be vested in three of their number, as trustees; who were to issue certificates to each member, expressing the number of shares or proportion of interest to which each individual was entitled, out of the whole purchase; and, by a vote of the company, these certificates were [*124] made transferable, by a blank endorsement * of the name of the person to whom they should be thus issued. The form of the certificate is established by the twelfth article of agreement; and it is provided, in the same article, that the same, when recorded in the manner therein prescribed, shall be complete evidence of the right of the person to whom it is issued in the said purchase.

In pursuance of these articles of agreement, conveyances were made, which constituted three persons the trustees of the land purchased as aforesaid; and, by request of *William Wetmore*, who was an original subscriber and purchaser, certificates were issued by them to *Robert Williams*, showing his right to a certain portion of the purchase, which he had required under the said *Wetmore;* and the plaintiff is *bona fide* holder of three certificates so issued, endorsed by the said *Williams*, in the manner required by said articles of agreement; and thereupon was considered and admitted to be a member of the said association, having a right to vote with, and being bound by the votes and doings of the said association, agreeably to their original compact with each other.

The company, contemplating some interference, on the part of the *United States*, to compromise the claims of the several parties, who held under the grant of the legislature of *Georgia*, by the twentieth

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article of the agreement under which they associated, authorized any five of the directors, or any agent who should by them be appointed, to grant, sell, convey, or release, to the *United States*, or to any persons, agents, or commissioners, authorized for that purpose, the whole, or any part, of the land belonging to the company, for such consideration, in money, by loan, or in parts of the land in confirmation of the remainder, as should be agreed on by the respective parties. And, by the twenty-second article, adopted in the form prescribed by their original articles of agreement, the directors were authorized and empowered to agree to release or assign to the *United States* the whole title and claim of the company to all the lands, or any part thereof, which they
* claimed under the act of the legislature of the state of [* 125]
Georgia, on such terms as had then been offered by authority of the *United States*. And the directors were empowered to direct and require the trustees for the time being to make and deliver a sufficient deed, for carrying the same into full effect; and it was voted that any certificate, or other consideration therefor, should be received and holden by the treasurer of said company, to be disposed of by order of the board of directors, for the use of the claimants, according to their respective interests, after the just claims and demands upon the company should have been discharged.

By the act of Congress which is referred to, and the terms of which are accepted in the said vote, certain commissioners were to be appointed; to whom was given authority, among other things, to determine upon the sufficiency of the releases and assignments which were to be given according to said act; and also *to adjudge and finally to determine* upon all such claims so released as aforesaid as might be found to conflict with and be adverse to each other. And it was further provided, that, after the commissioners should have made report to the president of the *United States* that nine tenths of the land had been released, with the names of the claimants, the president should order certificates to be issued to the several claimants; and, among others, to the persons claiming in the name of or under the *Georgia Mississippi Company*, a sum not exceeding one million five hundred and fifty thousand dollars. And it was further provided, that persons claiming under either of the companies thus provided for should receive indemnity only in proportion to the amount of such claims.

It is agreed, in the present case, that the *New England Mississippi Company*, and each individual thereof, including the plaintiff in this action, agreed and assented to the several acts of Congress passed upon this subject, and to the commissioners who were finally

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appointed to execute those acts; and that proper releases
[* 126] were made by the trustees of the lands of the * company; so that they became entitled to the indemnity provided for in the act.

The commissioners, having met, pursuant to the authority given them by the acts of Congress, and having heard the several parties who appeared before them, reported that a certain amount of stock was due to the *New England Mississippi Company*, according to the principles contained in the act; and, conformably to their report, certificates have been issued to, and received by, the treasurer of the said company, and are under the control and orders of the defendants, according to the authority given them by the articles of agreement aforesaid. But the amount of stock which would be due upon the proportion of said land originally purchased by *William Wetmore* aforesaid, was deducted from the amount reported to be due to this company.

The plaintiff's claim in this action rests upon the supposition that the interest of all the members of the *New England Mississippi Company*, in the purchase from the *Georgia Company*, formed a common fund, each individual's proportion of which was represented by the scrip or certificate which he held; and that any deduction from or diminution of the common fund was to be ratably apportioned upon the interests or shares of each individual, without any regard to the original title from which such share emanated.

If this is the true construction and legal effect of the association, entered into by the original subscribers, it is immaterial whether the commissioners have rightly executed their authority under the acts of Congress touching this subject or not; for, in such case, the members of the association must be viewed in the light of copartners, alike liable to profit and loss, in proportion to their property in the stock, from whatever cause a change in the amount or value of that stock may be derived.

But upon a careful inspection of the articles of association, we cannot fairly deduce any such principle from them. The object of the association was to unite the interest and the in-
[* 127] fluence of the whole, in establishing * the title to the land, or in obtaining indemnification in case that title should be destroyed; and to raise money to defray the expenses which it was foreseen would be incurred in the prosecution of either of these objects. And it was also contemplated that sales might be made, in case the title to the land should be confirmed; and that it was for the interest of all the purchasers that every thing should be managed, by agents of the association, for the common

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good. It is nowhere provided or implied that, if the right or interest of any of the members should be taken away from the common fund, by reason of any defect in the original title under which he claims, such individual should nevertheless retain his share in the residue, the other members sharing the loss with him.

Such a compact cannot be inferred from the original association, which was founded on the supposition that each subscriber had an indefeasible title to the share which he contributed to the common stock, except as that title might be affected in the whole purchase by the alleged fraud upon the legislature in obtaining the original grant; which, throwing a cloud over the whole title, might be supposed to create a common interest, so far as that might eventually affect the purchase; and for any diminution of the property on that account, an apportionment might have been contemplated, and was probably expected.

The proceedings of the commissioners under the act of Congress, assented to by the company, and by each member, the plaintiff in this action included, must be considered as causing a dissolution of the community of property relative to the purchase. For it is provided, in the twenty-second article of the agreement, that the directors, after settling the affairs of the company, and making the proper deductions to satisfy just claims, shall dispose of the stock or other consideration, which may be given by the *United States* for the use of the claimants or members, according to their respective interests.

The question therefore properly is, What is the interest *of the plaintiff in the common stock which is [*128] now to be divided? If it appears that she had no interest, or that what she, or those under whom she claims, may once have contributed has been withdrawn by herself, or by any other, with lawful authority claiming it in opposition to her; and that this has been done against the will, and contrary to the efforts and remonstrances, of the other partners; there seems to be no reason, either in law or equity, for obliging the others, who are innocent, to contribute to this loss.

If, on the dissolution of a mercantile copartnership, it should appear that the amount of stock, which one partner had contributed, had been taken out of the common fund by any one claiming property in the goods, surely the partner whose interest was thus affected could not claim an equal proportion of the residue of the stock, even if injustice had been done in awarding his property to another. Upon general principles of justice, therefore, we do not see that the members of this company are to be affected by the subduction from the common funds of so much as would cover the

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plaintiff's interest, provided it can be ascertained that the portion withdrawn is applicable to the plaintiff's interest in the fund. And this is manifest from the award of the commissioners, which deducts from the amount of the stock, which would be otherwise due to the company, so much as would be equal to the purchase-money which remained unpaid of *William Wetmore's* purchase; and it was under *Wetmore* that the plaintiff held her interest. If *Wetmore* had never transferred his interest in the land, and was now claiming a distributive share of the stock thus awarded to the company, he could have no pretence to support his claim, it appearing that nothing had been received by the company on account of his interest; but he would be left to contend with those who had withdrawn his share from the common fund.

But the equity of the plaintiff's claim is rested [* 129] *principally on the circumstances, that she is a *bona fide* purchaser of a portion of *Wetmore's* interest, and that she confided in the certificate which was issued to *Williams*, and which, by a vote of the company, was made transferable by endorsement, and was to be *complete evidence* of the holder's interest in the purchase. It is supposed that, by this act, the company guarantied to purchasers the value of their certificates, in the proportion they bore to the value of the whole purchase, notwithstanding any defect or encumbrance which might exist in the original title of the party, on account of whose interest such certificate issued.

But it certainly may be doubted whether any thing more could have been intended, than to assure the holder of the certificate of the proportion of which it was evidence against the company or the trustees, who held the legal title, as far as any existed, in the land. Whenever a person, being a *bona fide* holder of the certificate, with the name of the party to whom it issued on the back, produced it, it was to be recorded in the books of the company; and when so recorded, the party producing it became a member, and had a right to vote. His title should not be disputed, but the certificate should be *complete evidence*. This, probably, is all the inference that can fairly be made from the doings of the company in this particular; and falls short of a warranty against latent defect of title in the original purchaser, or any future impediment to it, not imputable to the laches or mismanagement of the company or its agents.

But supposing this view of the case to be questionable, we think, on another ground, that the defendants are not answerable in this action. It is agreed that the plaintiff assented to all the votes and doings of the company, in relation to the compromise with the United States, which was long desired, and finally effected; that she

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assented to the several acts of Congress, which authorized the appointment of commissioners, * and the settlement and adjustment of the claims, which were to be made pursuant to those acts. [* 130]

The act of Congress does not regard the companies or associations which had been formed by the individuals who had been adventurers in this speculation; but provides for the extinguishment of claims, and the indemnification of *persons* claiming lands in the *Mississippi Territory*. Under this act, the commissioners determined that they might lawfully consider the separate claims of individuals, without regard to the forms of association which they for their interest had adopted; and they chose to consider the portion which was originally purchased by *Wetmore* as subject to certain equitable claims of the party with whom he made his bargain.

The plaintiff's interest appears to have been faithfully represented, by the agents of the company, before these commissioners; and every consideration was presented to them which could tend to produce an award different from that complained of, but without effect. They thought it just and right to retain so much of the stock, which was applicable to the unpaid portion of the original consideration of *Wetmore's* purchase, for the benefit of the company of whom he had purchased; so that nothing is in the hands of the defendants arising from *Wetmore's* purchase. The plaintiff must be bound by this decision, while it remains unreversed; for the commissioners were judges chosen by her, as well as by the company. They undertook to sever her interest from that of the company; and if that was injuriously done, the defendants, or those whom they represent, ought not to be prejudiced; for the loss is imputable to an original encumbrance on the plaintiff's title, which they could not, and were not obliged to, remove.

If the commissioners have misconstrued their powers under the acts of Congress, as has been suggested, this is a particular misfortune to the plaintiff, which cannot be equitably distributed over all the members * whose title or interest in the land was unencumbered. The proper relief, in such case, would be by petition, in the nature of an appeal, to Congress; for no judicial tribunal, at least none of this commonwealth, has any jurisdiction over the subject. [* 131]

It is said, also, that the principle adopted by the commissioners, by which they withheld the land, or its equivalent, from an assignee, for a valuable consideration, without notice, of a secret lien, in order to secure the vendor, who had obtained his security at the

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time of the sale in the form stipulated, is incorrect, and cannot be supported by any precedents in courts of equity.

On this head we forbear to express an opinion, however doubtful we may be of the ground assumed by the commissioners, because we have not time to examine sufficiently to enable us to determine; and we should not choose to deny the position of gentlemen who appear to have weighed the subject deliberately. But be this as it may, the question before us cannot be affected by it, for the commissioners had jurisdiction of the subject; and even if they have decided erroneously, their decision is to be respected, while it remains in force.

As to their *authority*, under the act, to entertain the claim of *Jackson*, and to appropriate a part of the stock to compensate him for the notes of *Wetmore*, we have no doubt. The words of the authority are very broad: they are to adjudge and determine upon all controversies arising upon claims which may be found to conflict with, and be adverse to, each other. *Jackson's* claim conflicted with the plaintiff's, as represented by the *New England Mississippi Company*, and was therefore within their jurisdiction. If they have decided wrongly, we think the only remedy is to apply to Congress for a rehearing before the commissioners, or such other mode of redress as they shall see fit to apply.

Amory and *Ritchie* for the plaintiff.

[* 132] * *Bigelow* and *Blake* for the defendants.

Plaintiff had leave to discontinue

BENJAMIN JACOBS AND ANOTHER *versus* GILBERT MELLEN, AND ROBERT SAFFORD, JOHN WHEELER, AND LUSHER GAY, his Trustees.

Where the name of a trustee is collusively inserted in a process of foreign attachment, for the purpose of giving jurisdiction to the Court of Common Pleas in the county where such fictitious trustee dwells, the principal defendant may plead this matter in abatement.

THIS was an action of *assumpsit*, commenced at the Court of Common Pleas in *Boston*, April term, 1816. The plaintiffs, and *Robert Safford*, who was summoned as one of the trustees, are described in the writ as of *Boston*; the defendant *Mellen* is named

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of *Keene*, in the state of *New Hampshire*; and the other two trustees, *Wheeler & Gay*, are said to be of *Cambridge*, in the county of *Middlesex*. The three trustees were duly summoned; but there was no other service on the defendant.

The defendant *Mellen* pleaded, in abatement, that *Safford*, at the time of the service of the writ, and long before and after, had not in his hands any goods, effects, or credits of the defendant; that the plaintiffs, at the time of the purchase and service of their writ, well knew this fact, but inserted the name of *Safford* as a trustee collusively, for the purpose of giving jurisdiction to the court in *Boston*; — wherefore, as the other two supposed trustees lived in *Middlesex*, the writ ought to have been brought in that county, &c. This plea appears to have been filed at the said April term.

No replication was then made to the plea; but, at the ensuing term in July, the plaintiffs had leave to amend the writ, by striking out the name of *Safford*, as one of the trustees; and at the October term following, they replied that, by leave of the court, obtained at the said July term, they had so amended their writ, and struck out the name of *Safford*, and concluded with an offer to try it by the record.

* The defendant rejoined, that the plaintiffs did not [* **133**] so amend the writ at the said July term, and prayed that the record might be inspected, &c.

The record contained other matter, not bearing upon the point, afterwards decided by the Court here.

Williams, for the defendant, moved that the writ should now be abated, or the action dismissed, on the ground that all the trustees now named in the process were inhabitants of the county of *Middlesex*, and there had been no service on *Mellen*, the principal defendant. (1)

Ward, for the plaintiffs, contended that, the defendant living in *New Hampshire*, and the plaintiffs in this county, the action was well brought in this county, so far as respected those parties. As to the fact that none of the trustees lived in this county, the law which obliged the plaintiffs to bring their action in the county where some of the trustees reside, was made only for the convenience or benefit of the trustees; and none but one of the trustees, summoned out of his county, could take advantage of it. If they waive it, it is not for the defendant to make the objection, since he has no inconvenience from it. Here the trustees came in from *Middlesex* and made their disclosure, without taking the exception. In the case of *Wilcox* vs. *Mills*, (2) the default of the trustee improperly

(1) 5 *Mass Rep.* 201, *Davis* vs. *Marston & Trustee.* (2) 4 *Mass Rep.* 218

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summoned was held sufficient to cure the defect; and his voluntary appearance and submitting to examination is still stronger.

The plea, to avail, should have been made by *Safford*. The jurisdiction was unexceptionable, as it respected *Mellen*. If *Safford* had not been inserted, the action must have been sustained, unless the other trustees had taken the exception. The proceedings now are as if his name had never been in them; leave to strike out being, to all intents, equal to an actual striking out. Matter in abatement as to one, cannot be pleaded by another, party. (3)

Williams, in reply. The practice of inserting fictitious trustees has been severely censured by this Court. (4) The [*134] defendant has an interest in the question, *as the expense of the service will be charged to him, in case of a recovery against him; and, further, should the other trustees be discharged upon their disclosure, as there will have been no service on the defendant, the action must be dismissed for that cause.

Per Curiam. We have not found it necessary to examine the record, to ascertain whether there was any thing peculiar in the order for the amendment, as suggested by the defendant, or at what time the amendment was made; because, in any event, the writ must be abated.

If the name of *Safford*, as one of the trustees, was properly struck out, the writ must be considered in the same light as if his name had never been introduced; and, in that case, the Court must have abated the writ *ex officio*. The statute is peremptory, that, when all the trustees dwell in one county, the writ shall be made returnable there. On the other hand, if *Safford* is still to be considered as one of the trustees, then the replication is disproved.

We have no doubt that it is competent to the defendant to take this exception, and to plead it in abatement of the writ. It has been long since well settled, that a trustee, when summoned to appear out of his own county, may make such a plea, as to the supposed trustees who dwell in the county where the writ is returnable. *Wheeler & Gay*, in this case, might have pleaded this matter; and, if not denied, it would have abated the writ.

But the defendant, if he pleads in abatement, must, by our statute, file his plea at the first term, and before the jury is impanelled. At that time this defendant might not know whether *Wheeler & Gay* would plead in abatement or not, nor whether they would be finally adjudged trustees or not. If, therefore, he were not allowed to make this plea, it would depend on the will of

(3) *Lutw.* 36. — 8 *Co.* 159.
(4) 4 *Mass. Rep.* 81, *Barker* vs. *Tuber & Al. & Trustees.*

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the supposed trustees, whether there should be a judgment against him or not. If he should rely on their taking the exception, and should therefore neglect to appear, he would be defaulted; and the trustees, by * waiving the exception, [* **135**] might make the judgment conclusive against him.

If, on the other hand, the defendant should apprehend that they would not take the exception, and should therefore plead to the action, he would be concluded, by force of the statute of 1798, c. 5, although it should afterwards appear that there had been no sufficient service of the writ. The consequence would be, that, in every case where the defendant was not willing to be defaulted, and to suffer judgment against him, he must plead to the action, and so make the writ good, although the service was wholly insufficient.

If *Wheeler & Gay* alone had been summoned as trustees, the writ would have been abated at the motion of the defendant, or of any one as *amicus curiæ;* because the defect would be apparent on the face of the writ. The defect is not less fatal when the name of another supposed trustee is inserted, for the purpose of evading the statute; the plaintiff well knowing that he has no effects of the principal. Such an attempt to evade the statute would be wholly ineffectual; and the writ would be considered as if the name of the fictitious trustee had never been inserted.

But these facts cannot be made to appear without a plea; because the plaintiff must have opportunity to traverse them. Then it necessarily follows that the defendant may show the defect in the writ and service by a plea, when it does not appear upon the face of the proceedings; for the same reason, and with the same effect, as he may point it out to the Court, and take advantage of it, when apparent in the writ.

It was said that the defendant, in this case, could not object to the jurisdiction of the court in *Boston;* because, as to him, the action was well brought in the county where the plaintiffs lived. But the objection, as it lies in his mouth, is not that the court has no jurisdiction, but that there has been no legal service of the writ. The service on *Safford* is avoided by the facts pleaded; the service on *Wheeler & Gay* is prohibited * by the [* **136**] statute; so that, in effect, there is no estate of property of the defendant attached on the writ; and it appears, by the return, that no other service of the writ was made or attempted. This brings the case within that of *Gardner* vs. *Barker & Al.* 12 *Mass. Rep.* 36.

Writ abated.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, MAY TERM, 1817, AT YORK.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES.
HON. SAMUEL S. WILDE, }

NOAH RICKER *versus* WILLIAM HAM AND OTHERS.

Of fraudulent conveyances. The possession of land by a fraudulent grantee will not render invalid a title from the fraudulent grantor to a subsequent purchaser, with knowledge of the former conveyance.

TRESPASS against the defendants, for breaking and entering the plaintiff's close, &c. The defendants pleaded not guilty as to the force and arms, &c., and, as to the residue of the supposed trespass, that the *locus in quo* was the proper soil and freehold of the said *William Ham*; whereupon issue was joined.

At the trial of these issues, which was had at *Alfred*, October term, 1815, before *Wilde*, J., the plaintiff read, in evidence, a deed of the land in question, from *Ezekiel Gowen*, one of the defendants, to him, dated January 1, 1810, but actually executed, acknowledged, and recorded, on the 8th day of the same January.

The defendants then read to the jury a deed of the same land

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from the said *Gowen* to the other defendants, *William* and *Samuel Ham*, dated the 29th of September, 1812, and proved that they paid to said *Gowen* therefor the sum of [*138] ninety dollars, which appeared to be the value thereof.

They then proved that the first-mentioned deed was made without any consideration, and with a view to prevent the creditors of the said *Gowen* from taking the same in satisfaction of their debts against him; and that *John Leighton* and *Benjamin Heath*, on the said 8th of January, 1810, did extend their execution against said *Gowen* upon the said land, in part satisfaction thereof.

The plaintiff then proved that, after the extent of said execution, he, in December, 1810, paid to the said *Leighton* the amount of the appraised value of the land, with a view to redeem the same; and that the said *Leighton* promised to give him a release of the same, but failed so to do; that, after paying said appraised value to said *Leighton*, the plaintiff took possession of the land by running out the same and fencing it; that the said *Gowen* and *William Ham* were present when he ran the lines, and assisted therein; and that *Gowen* observed to him that he was glad that he, the plaintiff, had got the land. A witness testified that this observation was made when *William Ham* was present, and might have heard it, but could not testify that he did.

It appeared that, on the 17th of August, 1812, the said *Leighton* and *Heath*, the creditors in the said execution, released the land in question to the said *Gowen*, by their deed of that date.

Upon this evidence, the judge instructed the jury that the deed to the plaintiff was fraudulent and void, as against the creditors of *Gowen*, and *bonâ fide* purchasers for a valuable consideration of *Gowen*; and that the payment by the plaintiff to the said *Leighton* could not give a title to the plaintiff, as nothing passed by the deed of 1810, as against creditors of *Gowen* and after purchasers from him for a valuable consideration, and the plaintiff had derived no title from *Leighton*.

If this instruction was wrong, and if, upon the evidence stated, the soil and freehold of the land in question [*139] were by law in the plaintiff, the verdict returned for the defendants was to be set aside, and a new trial granted; otherwise, judgment was to be rendered upon the verdict.

Emery for the plaintiff.

Wallingford and *Holmes* for the defendants.

PARKER, C. J., delivered the opinion of the Court. *Ezekiel Gowen* having been the acknowledged owner of the land in dispute until January, 1810, when his deed to the plaintiff was executed, that deed conveyed his title to the plaintiff, as against the grantor

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and every other person, unless it was fraudulent at the time of its execution; in which case, it was void against creditors and subsequent purchasers.

The facts reported show that the deed was fraudulent; so that *Leighton* acquired a good title by the levy of his execution, to satisfy a judgment he had obtained against *Gowen*, the fraudulent grantor. By that levy the estate of *Ricker* was divested, and he could not afterwards acquire a title but under *Leighton*, the judgment creditor, or by a new deed from *Gowen*, made *bonâ fide*, and for a valuable consideration.

The payment of the money within the year to *Leighton*, with a view to redeem the land, could not, of itself, make a title to *Ricker*; for the deed under which he held being fraudulent in its creation, any other creditor might have levied upon the land; or any subsequent purchaser might have taken it.

Upon payment by *Ricker*, he was restored to the situation he was in before the levy; that is, he held under a fraudulent deed from *Gowen*. But it was always in the power of *Gowen* to defeat him of his title, by conveying to any person for a valuable consideration, even if such person knew of the conveyance to *Ricker*. The promise of *Leighton* to give a release avails nothing, because it was not performed; and if it had been, the debt being paid before the year from the levy expired, the release would have passed no estate; but *Ricker* would have been in, of his former fraudulent [* 140] estate, the * fraud being purged only as against *Leighton*.

When, therefore, *Ricker* entered into the premises, run the lines, and put up the fences, he had only a defeasible title under *Gowen*; and that might be defeated by a conveyance from *Gowen* to a purchaser for a valuable consideration.

The release made on the 17th of August, 1812, by *Leighton* to *Gowen*, merely removed an encumbrance, supposed to exist by virtue of the levy; but no such encumbrance, in fact, existed; for the money was paid long before by *Ricker*. This transaction shows, however, unless some reason for it exists unknown to us, that *Leighton* was willing to assist *Gowen* to cheat *Ricker*, who had before assisted him to cheat *Leighton*, and this in direct violation of the promise made by *Leighton* to *Ricker*. Whether this sort of retaliation be justifiable according to the scale of morals which these parties are governed by, we do not know; but it certainly has the appearance of fraud according to common notions.

Gowen, however, had the power to convey, and he did convey, to the defendants, for a valuable and adequate consideration; and this conveyance passed the title to the defendants, if this deed of *Gowen* was valid and operative at the time. Here, again, is a transaction, in

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which another party, *viz.*, *William Ham*, one of the grantees, participated; and which looks like a fraudulent combination to cheat *Ricker* out of the land, or the money he had paid to *Leighton*. But we apprehend that this has no effect upon the question of legal title, which is all we have to settle in the present action. If *Ricker* can, by another action, compel *Gowen*, or any of these persons, to refund the money, we shall not be sorry; although he is the author of his own misfortune, in having consented to become the instrument of fraud for one who appears not to have honor or honesty enough to refrain from defrauding the friend who assisted him to defraud others.

The knowledge of *William Ham* that *Gowen* was in possession, professing to have some title, may be * pre- [*141] sumed from the evidence reported, although it is not expressly found by the jury. If this knowledge were important to the decision, there ought to be a new trial, to ascertain whether it existed or not. But it is clear that a subsequent purchaser of land, fraudulently conveyed, will hold, even if he knew of the former conveyance; for that is absolutely void against creditors and subsequent *bonâ fide* purchasers. (*a*)

It has been supposed, in the argument for the plaintiff, that the knowledge of *Ham* would show that he was not a *bonâ fide* purchaser; but we apprehend the term *bonâ fide*, as used in the law upon this subject, means only that the purchase shall be a real and not a feigned one; otherwise the knowledge would not be held immaterial, as it is in all the books.

The only point which has occasioned doubt is, whether the deed from *Gowen* to *Ham* passed the land, as *Ricker* was then in possession. But he was not in as a disseisor of *Gowen*, but under him, and relying upon a fraudulent deed; and the possession of a fraudulent grantee would not, in our apprehension, render invalid a title from the fraudulent grantor to a subsequent purchaser. Otherwise it would be impossible for the purchaser to avail himself of a title which the law holds good. For if an action were brought by the grantor, in order to divest the grantee, that he might convey, he would be estopped by his deed, against which he could not allege fraud, in which he was the principal.

We are therefore of opinion that the verdict is right; and although we see no commendable conduct in any of the parties to this transaction, we are bound by the principles of law to render judgment for the defendants.

(*a*) [*Hill* vs. *The Bishop of Exeter*, 2 *Taunt.* 69. — *Doe* vs. *Manning*, 9 *East*, 59. — *Bothul* vs. *Martyn*, 1 *New. R.* 332. — *Huron* vs. *Wilsmore*, 8 *D. & E.* 528. — *Rodgers* vs. *Langham*, 1 *Sid.* 133. — ED.]

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THATCHER, J., said the case seemed to him to present two distinct questions proper to be referred to the jury; the latter of which he thought had not been clearly laid before them in the charge given to them at the trial.

The first question was on the validity of the deed [* 142] * from *Gowen* to *Ricker*, executed on the 8th of January, 1810; which (as it was admitted that *Leighton* and *Heath* were *bonâ fide* creditors to *Gowen*, and their levy regular in all its parts) was, he thought, clearly fraudulent as to them; and that the levy vested a good title in fee to the land, subject to be defeated only by a payment of the judgment, &c., within a year, by *Gowen* or his assignee.

The second question was, whether the transactions between *Leighton*, *Gowen*, and the *Hams*, relative to the claim and possession, which *Ricker* had acquired posterior to the levy of *Leighton* and *Heath*, and in themselves unconnected with the aforesaid deed, were not fraudulent as to *Ricker's* right, whatever that was.

This subject the judge thought was not submitted distinctly enough in the charge to the jury. But the whole charge was confined to an inquiry whether the deed of the 8th of January was fraudulent or not; and, from the facts in the case, he was inclined to think that, although that deed was a fraud upon *Leighton* and *Heath*, and so void, yet *Ricker* might after that lawfully and honestly have acquired such an interest in the same land as the law would protect against conspiracy and fraud in others; and it became a question of importance to *Ricker* to have that fully investigated.

The report states that, in December, 1810, eleven months after the execution of the fraudulent deed, *Ricker* paid, of his own money, to *Leighton* and *Heath* the amount of their judgment, with the costs and charges, and they engaged to give him a discharge of their levy. About the same time, the land was actually set off to him by *Gowen*, with whose knowledge the said payment was made, and under circumstances that a jury might find the *Hams* had full notice. In addition to this, *Ricker* then took possession of the land, fenced it, and kept open possession of it until the commencement of the present action. All which facts, being submitted to a jury, and found by them, he thought would warrant the conclusion that there was a fraud committed by *Leighton*, *Gowen*, and [* 143] the *Hams*, * upon *Ricker*; and that the deeds from *Leighton* to *Gowen*, and from *Gowen* to *Ham*, were void; and consequently the right and possession of *Ricker*, what

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ever they were, remained in him, and were sufficient to enable him to maintain trespass against the defendants. (*a*)

Per Curiam. *Judgment on the verdict.*

(*a*) [The true view of the case seems to be that *Ricker*, claiming under a voluntary deed from *Gowen*, the validity of which he could not dispute, by paying the full value of the land to *Leighton* in discharge of the execution levied upon the premises long before the second deed of *Gowen* to the *Hams* confirmed his own title; it being well settled that a voluntary conveyance may be made good by subsequent transactions. — *Wood* vs. *Jackson*, 8 *Wend.* 9. — *Sterry* vs. *Arden*, 1 *Johns Ch. Cas.* 271. — *Elwson* vs. *Parr*, 1 *East*, 95. — *Rodgers* vs. *Langham*, 1 *Sid.* 133. — By the payment of the amount in the execution the claim of *Leighton* and *Heath* was extinguished, and, besides, the release by them to *Gowen*, if it was of any consequence, enured to the benefit of *Ricker*. — ED.]

JAMES BARRETT *versus* AARON PORTER.

Where it appeared, on the return of an extent of an execution on land, that three appraisers were appointed and sworn, and that all the three had acted in the appraisement, although the certificate was subscribed by two only, and no reason given why the third did not subscribe, it was holden, that the return might be sustained. (1)

Where, at the time of the conveyance of land, a part of it was under attachment at the suit of a creditor of the grantor, and afterwards execution in the same suit was extended thereon, this was holden to be an encumbrance within the covenant in the deed, that the title was free from encumbrances. The extent was holden to be an eviction; and the appraised value of the land extended upon was made the measure of damages.

IN covenant broken, on a conveyance of land with a covenant that the premises granted were free of encumbrances, it was agreed that, prior to the conveyance, a creditor of the grantor had attached the same land on mesne process, and after the conveyance had extended his execution on a part thereof.

Mellen, for the defendant, objected to the service and return of the execution, that the appraisement was certified and subscribed by two only of the appraisers, although three were sworn, and the one who did not sign the certificate acknowledged the receipt of his fees as an appraiser. No reason was assigned for the omission of his subscription. (2)

But the Court thought, on the ground that it appeared that three were duly appointed and sworn, and that there was evidence that the three had acted under their appointment, the return might be sustained.

(1) *Moffit* vs. *Jaquins & Al.* 2 *Pick. Rep.* 331. (2) 8 *Mass. Rep.* 284.

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Mellen then contended that, as no actual eviction of the plaintiff was shown, and it did not appear that he had removed the encumbrance, by redeeming the land, he was entitled to nominal damages only; and he cited, to this point, the case of *Prescott* vs. *Trueman.* (2)

The Court observed that here was an actual eviction under a paramount title, and as this had been ruled, in the [* 144] * case last cited, to be a breach of the covenant against encumbrances, the proper measure of damages would be the sum at which the land was appraised, with interest thereon from the time of the eviction; and judgment was entered accordingly upon the default of the defendant.

(2) 4 *Mass. Rep.* 627.

BENJAMIN PATTERSON AND ANOTHER *versus* THOMAS BUCKMINSTER AND TRUSTEE.

Where, in a foreign attachment, the trustee had disclosed, but in a manner not satisfactory, and a further examination was ordered to be had before a justice of the peace, to which the trustee refused to submit, and before the next term the principal debtor and the trustee died, judgment was entered against both as of the preceding term.

ACTOR PATTEN, the supposed trustee, came into Court at the last May term, and made a disclosure, which not being sufficient, a further examination was ordered to be taken before a justice of the peace. *Patten* refused to submit to such further examination; and he as well as *Buckminster*, the principal defendant, both died before the present term, the latter having been defaulted before his death.

The Court adjudged *Patten* to be the trustee on his first disclosure, and ordered judgment to be entered against *Buckminster* as of the last May term, and that execution issue as of that term against his effects in the hands of *Patten.*

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTIES OF CUMBERLAND AND OXFORD MAY TERM, 1817, AT PORTLAND.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES
HON. SAMUEL PUTNAM, }
HON. SAMUEL S. WILDE, }

THE PEJEPSCUT PROPRIETORS *versus* THOMAS RANSOM

Of the sale of non-residents' lands for the payment of taxes.
[Where the question was, whether the officer who sold the lands was duly chosen and qualified, and whether he acted by virtue of assessments duly made, and whether due notice was given, held, that, after the lapse of thirty years, they might lawfully presume that all was done according to law. — ED.]

IN this action, the said proprietors demand one hundred acres of land in *Brunswick*, counting upon their own seisin within thirty years, and upon a disseisin by the tenant.

A trial was had upon the general issue, before *Thatcher*, J., October term, 1815. The tenant admitted the original right of the demandants to the land in question, but claimed to hold the same under a deed from one *Ephraim Hunt*, as collector or constable of *Brunswick*, for taxes assessed on the same as land of non

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resident proprietors; and he produced the deed of said *Hunt* to *Samuel Thompson*, dated the 8th of May, 1780, purport-
[* 146] ing to convey "1700 acres of undivided * land, 100 acres claimed by *Samuel Cothran*, and 936 acres belonging to the heirs of *Hannah Fayerweather*," all which lands are stated in the deed to have been assessed in the sum of £368 12*s* 4*d*., and for the non-payment of the said sum, to have been sold to said *Thompson*, at public auction, according to law, for the sum of £479 5*s*. 6*d*., being the amount of the taxes and intervening charges, and he being the highest bidder. The tenant also proved that the demanded premises were parcel of the said 1700 acres, and that the said *Thompson* entered upon the said 1700 acres soon after the said conveyance, and exercised acts of ownership thereon.

The tenant also gave in evidence the copy of a record of the town of *Brunswick*, showing that *Hunt* was, at a town meeting holden May 4, 1779, chosen and sworn as constable for the year 1779. The tax bills of the town, signed by certain persons as assessors, were produced, by which it appeared that the three several parcels of land mentioned in said deed were separately valued and assessed; and it also appeared that they were bid off in several lots at the auction. There was some evidence which went to show a want of conformity to the requirements of the law as to the advertisements prior to the sale.

The demandants insisted that the tenant, to establish the validity of the said deed from *Hunt* to *Thompson*, should be holden to prove that the said *Hunt* had been duly chosen into office at a legal town meeting, duly called for that purpose, and that he acted by virtue of assessments committed to him by assessors, also duly chosen at a legal town meeting for the purpose. But the judge who sat at the trial ruled that, as the copy of the record of the choice of *Hunt* had been produced, together with the bills committed to him to collect, it might be presumed that all the other prerequisites for giving him authority were complied with.

The demandants also insisted that the said deed of *Hunt* must be inoperative, inasmuch as the three tracts of land men-
[* 147] tioned therein were taxed separately in the * tax bills, and were sold separately at the auction, but were nevertheless in the said deed alleged to have been put up for sale, and to have been sold, for one sum in gross, including the taxes and charges of sale on all the said parcels; so that the proprietor of each parcel could not have ascertained therefrom what part of the consideration stated in the deed it would be his duty to tender, in order to redeem his land. But this point was likewise overruled by the judge.

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The demandants further insisted that the said deed was inoperative for want of a sufficient description of the land intended to be conveyed, and because there was no tract of 1700 acres taxed in the said tax bills. But the judge also overruled this objection; because there was in said bills a tract of 1708 acres taxed, which should be presumed to be the same tract, which in the deed is called 1700 acres.

A verdict being returned for the tenant, the demandants filed exceptions to the said opinions of the judge, which were argued at the last May term in this county, by *Whitman* for the demandants, and *Orr* for the tenant.

At this term, *the Chief Justice* stated that, since the last term, the five justices of the Court had conferred on this action, and were all of opinion that, as to the regularity of the choice of the assessors and constable, and of the proceedings of the assessors, and of the constable, before the sale, as to the notifications, &c., it was proper to leave the evidence to the jury, with instructions that they might lawfully presume that all things were done according to law, especially as more than thirty years had elapsed between those transactions and the commencement of this suit.

It was also said by *the Chief Justice*, that the Court saw no objection to the joining of several tracts of land, sold for several taxes and belonging to several proprietors, in the same deed. The inconveniences suggested, of the difficulty to the individual proprietor in ascertaining the proportion of the consideration necessary to be advanced by him, in order to redeem his *land, was more imaginary than real; for the assess- [*148] ment lists and tax bills are deposited with the town clerk, and each proprietor may know how much his land is held for. With respect to the proportion of the expenses, a tender of a proportion, according to the number of lots sold, would be sufficient. The description of the land in the deed was sufficient.

Per Curiam.

Judgment on the verdict.

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GIDEON WALKER, Plaintiff in Error, *versus* SAMUEL MELCHER.

If referees, under the statute of 1786, c. 21, agree upon their report during a session of the Court of Common Pleas, such report is regularly to be returned at the next succeeding term of the court.

ERROR upon a judgment of the Court of Common Pleas for this county, rendered June term, 1814, upon the report of referees appointed pursuant to the statute of 1786, c. 21, commonly called *The Referee Act*, and which was accepted at that term.

From the record it appeared that the rule of reference was entered into on the 15th of November, 1813. The report commenced thus: "*Cumberland*, ss. *Brunswick*, November 30, 1813. Pursuant to the within rule, we, the undersigned referees therein named, having met, and fully heard the parties, &c., and now, on this 7th day of March, 1814, report," &c. It was subscribed by two only of three referees, to whom the submission was made; but the third certified at the foot of the report, under date of November 30, 1813, that he was present at the hearing, but gave no opinion as to the damages, &c.

The errors assigned were — 1. That the report, having been made upon the 30th of November, 1813, should have been returned to the then *next* Court of Common Pleas, which was holden on the first Tuesday of March, 1814. 2. That the assessment of the damages was made on the 7th of March, 1814, and it did not appear that the referee, who did not subscribe the re-
[* 149] port, had any notice or knowledge of the meeting * of the referees on said day, or of their assessment of damages. 3. That it did not appear that the plaintiff in error had any notice of the said last-mentioned meeting, &c.

[*Note.* — It appeared that the Common Pleas for this county was sitting on the 7th of March, 1814; and it seemed to be understood that the report had been originally presented at that term, and recommitted to amend some informality; but this did not appear from the record.]

Orr, for the plaintiff in error, cited the cases of *Mott* vs. *Anthony*, (1) *Southworth* vs. *Bradford*, (2) and *Short* vs. *Pratt & Al.* (3)

By the Court. The objection, that the report was not made to the next court after it was agreed upon, is not supported in point

(1) 5 *Mass. Rep.* 489. (2) *Ibid.* 524. (3) 6 *Mass. Rep.* 496.

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of fact. The court being in session upon the 7th of March, the next term holden in June was the proper time for the return and acceptance of the report.

The referee, who did not join in the report, appears to have been present at the hearing, but did not agree with his brethren as to the amount of the damages. The report by the others is sufficient within the statute and the agreement of the parties.

The certificate of the referees, that they had fully heard the parties, is a sufficient answer to the third objection.

Alden for the defendant in error.

Judgment affirmed.

DANIEL LUNT *versus* JOHN HOLLAND.

Of the construction of grants, as relates to the boundaries of the land granted. [Where a survey is referred to in a deed, the grantor is bound by it. Land granted as bounded by a river, extends to the thread of the river. — ED.]

TRESPASS *quare clausum fregit.* Issue was joined on the plaintiff's seisin, which was tried before *Thatcher*, J., at the last October term in this county.

The plaintiff derived his title from a grant of the commonwealth, in which the premises conveyed are described as "a certain tract of land lying in the township numbered one, in the county of *Cumberland*, * which was surveyed and laid [* **150**] out in April, 1789, by *Samuel Titcomb*, and is bounded as follows, *viz.*, beginning at a hemlock tree standing by the south side of the River *Androscoggin*, thence south, &c., to another hemlock tree also standing by said river, thence south-eastwardly and bounding by said river to the first-mentioned bound, said tract containing 4880 acres, more or less."

The *locus in quo* was an island containing about thirty acres, the river running on each side of it, and lies between the said two hemlock trees, and nearest to the shore of the plaintiff's said grant.

In addition to the deed from the commonwealth, the plaintiff produced the deposition of the said *Titcomb*, with a copy of his survey referred to in the said deed; from which it appeared that he intended to include the island in question, and that he returned the said survey to the commonwealth's agents, previously to their executing the said deed.

The defendant objected to the admission of the deed, deposition,

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and plan aforesaid, as evidence to prove the soil and freehold of the said island to be in the plaintiff. The judge overruled the objection. The defendant then contended that the tract of land granted to the plaintiff must be limited by the boundaries in the deed, and that by them the island in dispute was necessarily excluded from the land granted; and that the boundaries, being definite, and fixed by monuments, could not be so extended, by any reference to said plan, as to include the island in the said grant.

The judge directed the jury, that, as there was a direct reference in the deed to the survey taken by *Titcomb* and annexed to his deposition, the island should be considered as within the description of the land in the deed; and as land granted as bounded by a river is held to extend to the thread or channel of the river, and as here were two channels, it might well be presumed the intent of the parties to the conveyance that the grant was intended to extend to that channel, which would include the island.

[* 151] * A verdict was returned for the plaintiff, subject to the opinion of the whole Court upon the direction of the judge, and the admission of the said deed, deposition, and plan.

Fessenden, for the defendant. The land is described in the grant, and bounded by visible and known monuments, and by these the island in question is plainly excluded. There is no ambiguity in the language, and no construction *ab extra* should be admitted. "Bounding by the river," must intend that edge of the river or which the hemlock trees stood, or those trees cannot be any part of the boundary. But at the farthest, the land granted can be held to extend only to the thread of that branch of the river on which the trees were standing. The plan was improperly admitted. It was not an ancient one, and it was taken between other parties. (1)

Whitman and *Greenleaf* for the plaintiff.

By the Court. The commonwealth, in its deed to the plaintiff, having referred to *Titcomb's* survey, must be bound by it. The grantee must take in conformity to that survey, and the island, being included within the land surveyed, must pass by the deed. Besides, land granted as bounded by a river extends to the thread of the river, unless, from prior grants on the other side of the river, such a construction is negatived; and in this case the channel on the farther side of the island may well be considered as intended by the description in this grant.

Judgment on the verdict

(1) 2 *Mass. Rep.* 380, *Howe & Al.* vs. *Bass.* — 4 *Mass. Rep.* 114, *Crosby* vs. *Parker.* — 5 *Mass. Rep.* 357, *Powell* vs. *Clark.* — 6 *Mass. Rep.* 133, *Pernam* vs. *Weed*

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JOSEPH PROUT *versus* SIMON LIBBY.

A plea of non-tenure without disclaimer was holden good.

THIS was a writ of *formedon in remainder*, to which the said *Libby* pleaded the following plea: —

"And now the said *Libby* comes and defends, and prays judgment of the writ and declaration aforesaid, and that the same may be abated; because he says that he is not tenant of the freehold of the demanded premises, nor was he at the time of the commencement * of said action; but that *Simon Libby*, [* 152] Jun., of, &c., at that time was tenant of the freehold of said premises, and that he, the said *Simon Libby*, at the time aforesaid, was, and now is, only tenant at will of the same under the said *Simon Libby*, Jun.; and this he is ready to verify; wherefore he prays judgment of the writ and declaration aforesaid, and that the same may be abated."

To this plea the demandant demurred, and the said *Libby* joined in demurrer.

Whitman and *Hopkins*, in support of the demurrer, argued that the tenant was bound to disclaim, and that a plea of non-tenure without disclaimer, though good in *England*, where its only effect is to put an end to the suit without judgment, (1) is not a good plea here; since the demandant is, by our statute, (2) entitled to judgment for costs against the tenant in possession, whether tenant of the freehold or not, if he has illegally withheld the possession from the demandant.

Mellen and *Longfellow* for the tenant.

Per Curiam. The statute does not require a disclaimer; and the plea is sufficient at common law.

Writ abated.

(1) 13 *Mass. Rep.* 499, *Prescott* vs *Hutchinson.* (2) *Stat.* 1795, c. 75.

CHARLES ATHERTON *versus* THOMAS BROWN.

Property was insured "on board the *Spanish* brig *New Constitution*;" the vessel was captured, and, with her cargo, was condemned as *American* property.

It was holden that the description in the policy amounted to a warranty that the vessel was *Spanish*; and that it was not competent for the assured to show that

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the underwriters were informed, at the time of their subscription, that she was, in truth, an *American* vessel, and was to be ostensibly *Spanish*, for the purpose of avoiding capture by the enemy.

ASSUMPSIT on a policy of insurance, whereby the defendant insured 200 dollars for the plaintiff, on "*property on board the Spanish brig New Constitution*, from the *Havana* to her port of discharge in the *United States*."

In a case stated for the consideration of the Court, it was agreed that the plaintiff was interested to the amount insured by the policy in property on board the *American* brig *Stranger*, of *Portland*, which was at the *Havana* when news of the war between the [* **153**] *United* * *States* and *Great Britain* was received here; that, for the purpose of eluding capture by the enemy, the agent of the owners of the vessel and cargo, through the intervention of a *Spanish* house, procured papers for said vessel and cargo from the custom-house at the *Havana*, making the vessel ostensibly *Spanish*, although still the property, in fact, of her original owners in the *United States*; and altered her name to the *New Constitution*, and put on board her a *Spanish* captain and crew. On her passage for the *United States*, she was captured and condemned, with the cargo on board.

It was admitted by the defendant that the plaintiff's agent, who procured the insurance, a credible witness, whose testimony could not be disproved, would testify, if admissible, that, at the time of effecting the insurance, he informed the defendant that the vessel on board of which the property was to be shipped was the brig *Stranger* aforesaid, and that her real *American* character was not to be changed; but that she was to be rendered ostensibly *Spanish*, for the sole purpose of avoiding capture by the enemy.

Judgment by default or nonsuit was to be rendered in the action, as the opinion of the Court should be on the foregoing statement.

Whitman, for the defendant, contended that the policy contained a warranty that the vessel was *Spanish*. Such was the obvious meaning of the words used. Such a warranty is to be fully and rigidly complied with. The fact is confessedly otherwise here. If this was made known to the defendant at the time of effecting the insurance, it is not competent for the plaintiff to prove that fact by parol evidence. If the fact had been communicated in writing, it would still be incompetent to show it. It ought to have been inserted in the policy, if the assured intended to avail himself of it. (1)

Todd, for the plaintiff. The words relied on by the defendant, as

(1) 12 *Mass. Rep.* 96, *Higginson* vs. *Dall.*

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constituting a warranty, were nothing more than a description of the vessel. It is observable, too, that the insurance here being only upon a part * of the lading, and not upon the [* 154] vessel, this description becomes still less material. In the case of *Manly* vs. *The United Marine and Fire Insurance Company*, (2) the vessel not being at the place mentioned at the commencement of the risk, was held to be an immaterial circumstance.

The parol evidence was only to rebut the imputation of fraud, and not to explain, construe, or contradict the written contract. Its admission, therefore, would not oppose any of the established rules of evidence. (3)

Per Curiam. The question is, whether the words in the policy, *viz.*, *the Spanish brig New Constitution*, amount to a warranty that the vessel was *Spanish;* or whether they may be considered as merely descriptive of the vessel, or as the name of the vessel. We are of opinion that the description of the vessel, as contained in this policy, includes her national character, and that it amounts to a warranty that she was, in fact, a *Spanish* vessel.

Parol evidence of what was within the knowledge of the under writers was not admissible. (*a*)

It being agreed that the vessel was not *Spanish*, but *American*, the warranty was not complied with; and the defendant is not liable in this action. (4)

Plaintiff nonsuit.

(2) 9 *Mass. Rep.* 87.
(3) 2 *Brown's Civ. and Adm. Law*, 300, 302. — 2 *Rob. Adm. Rep.* 156. — 1 *Rob. Adm. Rep.* 287.
(*a*) [*Ewer* vs. *The Washington Ins. Co.* — ED.]
(4) *Vide ante*, p. 106, *Higgins* vs. *Livermore* S P

JOEL ROSE *versus* JOSEPH D. LEARNED AND ANOTHER.

A nonsuit is only to be ordered at a trial for the insufficiency of the evidence on the part of the plaintiff, not on evidence produced by the defendant.

ASSUMPSIT on a promissory note for 394 dollars 22 cents, made by the defendants March 11, 1809, and payable to the plaintiff or his order.

At the trial on the general issue at the last October term in this county, before *Thatcher*, J., after the plaintiff had produced the

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note declared on, the execution of which, on the part of the defendants, was not denied, the defendants read in evidence the deposition of one *Martin Rose*, which went to show that the [*155] note was *originally given on a condition which had wholly failed, and that, of course, nothing was due upon the note; and that an agreement to that effect was executed by the witness, as agent for the plaintiff, which the witness testified had been lost by accident. The plaintiff objected to the admission of said deposition in evidence, on the ground that the note was explicit in its terms, and free from all ambiguity.

The judge overruled the objection, admitted the deposition, and upon the evidence contained in it ordered a nonsuit, subject to the opinion of the Court.

Todd for the plaintiff.

Whitman for the defendants.

Per Curiam. The nonsuit must be set aside, and a new trial granted; because the nonsuit was ordered, not for the defect of evidence on the part of the plaintiff, but on evidence produced by the defendant, which might not have been believed by the jury.

Further, the facts contained in the deposition read at the trial would not avoid the note, unless proved by writing. The evidence that a written agreement to the same effect has been lost is not sufficient. (*a*)

New trial granted.

(*a*) [See *Lock* vs. *Wood*, 16 *Mass. Rep.* 317, and note. — *Mitchell* vs. *New E. M. Ins. Co.* 12 *Mass. Rep.* 49, and note. — *Bridge* vs. *Sumner*, 1 *Pick.* 371. — *Babcock* vs *Thomas*, 3 *Pick.* 403. — *Dewar* vs. *Purday*, 4 *Nev. & Man.* 633. — 3 *Ad. & E.* 166. — *Tidd, P. Forms*, 6th ed. 370, 371. — ED.]

THOMAS BAILEY *versus* WILLIAM JEWETT AND JAMES JEWETT.

Property was attached on mesne process, and delivered to keepers, on their receipt and promise to redeliver the same to the officer on demand. On issuing execution, and within thirty days from the judgment, the officer demanded the property without effect. On an alias execution, the judgment debtor was committed and discharged, upon taking the poor debtor's oath. The keepers were still held liable to the officer on their contract.

THIS was a special action on an accountable receipt, given by the defendants to the plaintiff, then a deputy sheriff.

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The cause was submitted to the decision of the Court upon certain facts agreed, in substance as follows: One *Augustus Patrona* commenced a suit against the defendant *William Jewett*, in which the plaintiff, by * direction of the creditor, [* **156**] attached a vessel, of which the said *William* was a part owner. The plaintiff retained possession of the vessel a few days, and then delivered her to the defendants, taking the receipt therefor, with a promise to deliver the same to him on demand. The vessel was afterwards sent to sea and was lost. *Patrona* recovered judgment in his said suit, and delivered his execution to one *Swett*, then a deputy sheriff, for service, the plaintiff having before that time gone out of office. *Swett* demanded and received the said receipt from the plaintiff, and on the same day applied to the defendants with it, and demanded of them the said brig, that he might levy the execution thereon. All this was done within the thirty days from the said judgment. *Swett* returned the execution unsatisfied. Afterwards *Patrona* sued an *alias* execution upon his said judgment, upon which the said *William* was committed to prison, from which he afterwards obtained a discharge by taking the poor debtor's oath.

Judgment was to be entered in the action, upon the default of the defendants or the nonsuit of the plaintiff, as the opinion of the Court should be upon the facts stated.

Longfellow, for the defendants, argued that the taking the body of the judgment debtor, and committing him in execution, was a waiver of the attachment, and of any right arising on the contract sued in this action.

Emery for the plaintiff.

Per Curiam. The plaintiff was liable to the judgment creditor, having attached the vessel, and afterwards having permitted her to be taken out of his custody. The creditor having sued out his execution, and delivered it to an officer, who within thirty days from the judgment demanded the same of the defendants, they are liable, upon their receipt, for the value of the vessel, or so much thereof as shall be sufficient to satisfy the judgment in the suit in which it was attached.

*The taking the judgment debtor on the *alias* ex- [* **157**] ecution, and committing him, has not the effect of discharging this contract. It is no satisfaction of the judgment, and the creditor had a right to try that remedy, without incurring the loss of his claims on the plaintiff arising under the original attachment.

Defendants defaulted. (1)

(1) See 11 *Mass. Rep.* 317, *Lyman vs. Lyman & A.*

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JOHN DUNNING *versus* DAVID OWEN AND RUSSELL STODDARD, his Trustee.

It is not a sufficient bar, by the principal debtor in a foreign attachment, that the person summoned as trustee had not, at the time of the service of the process upon him, any goods, effects, or credits, of the principal in his hands.

To an action of debt on judgment, in which also a trustee was summoned, the defendant pleads, in bar, that the plaintiff had caused him to be committed to prison in execution of the judgment.

The plaintiff replies, that, after suing out his execution, he discovered goods, effects, and credits, in the hands of the supposed trustee, unattachable by the common and ordinary process of law; whereupon he sued his writ in this case, and within seven days thereafter caused the defendant to be discharged from his imprisonment, according to the statute, &c.

The defendant rejoins, that the plaintiff knew of the depositing of the said goods, &c., long before the commitment of the defendant, and might have attached the same, and that the said goods, &c., were, before the said commitment, for a valuable consideration, assigned, &c.

On demurrer to this rejoinder, the plaintiff had judgment.

THE plaintiff declares in *debt* on a judgment recovered by him against the said *Owen*, at the Court of Common Pleas for this county, June term, 1811, for the sum of 536 dollars 16 cents damage, and 16 dollars 99 cents costs; which judgment he alleges to be in full force, not reversed, annulled, or satisfied, although a writ of execution had issued thereon; whereby an action has accrued to him, to recover the said sums, with 16 dollars 69 cents more, for the execution and expenses in the service thereof.

The defendant pleads in bar, that the plaintiff delivered his said execution to a deputy sheriff, who, on the 13th of August, 1811, in virtue thereof, took the body of the said *Owen*, and committed him to prison in execution of said judgment, as by the said execution he was commanded to do.

The plaintiff replies to this plea, alleging that, after the recovery of the said judgment, and after the issuing of the said
[* 158] execution, he discovered goods, effects, and * credits, of the said *Owen* in the hands and possession of the said *Russell Stoddard*, which could not be attached by the common and ordinary process of law; whereupon, on the 30th of May, 1812, he sued out the original writ in this case; and within seven days after the service thereof on said *Stoddard*, *viz.*, on the 4th of June, 1812, he discharged the body of said *Owen* from prison, by a note or memorandum in writing, directed and delivered to the officer who had him in custody, stating the reason and occasion of the said discharge, pursuant to the form of the statute in such case made and provided.

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The defendant, in his rejoinder, avers that, long before, and on the day of, the commitment of him, the said *Owen*, in execution of the judgment aforesaid, he had deposited in the hands of said *Stoddard* certain effects and credits of his, *viz.*, the rents of a certain tenement in *Brunswick*, to the amount of 487 dollars and 50 cents, secured by deed indented; which said rents were all the effects or credits which the said *Owen* had ever deposited in the hands and possession of the said *Stoddard* before the date of the plaintiff's said writ, of which the plaintiff then and long before, and on the day when the said *Owen* was committed to prison as aforesaid, had due notice from the said *Owen;* which effects and credits the plaintiff, before and on the day of said commitment, might have attachment in the hands of the said *Stoddard;* and the same continued in the hands and possession of the said *Stoddard* until the 20th of September, 1811, when the said deed, and all the rents therein secured to be paid as aforesaid, were, for a good and valuable consideration, duly and legally assigned to one *Mary Owen;* of all which the plaintiff, at the time of suing out the writ in this action, had notice.

To this rejoinder, the plaintiff demurs, and assigns for cause, that it is double in this, that it is therein alleged that before and on the day of the said commitment, the said *Owen* had deposited, &c., of which the * plaintiff had notice, &c., [* **159**] and that the plaintiff might long before have attached the same; and also that the said *Owen* had, for a good and valuable consideration, assigned the same, &c., and that the plaintiff had notice of said assignment, &c.

The defendant joins in demurrer.

The defendant, in a *second* plea in bar, alleges that, at the time of suing out the plaintiff's writ against the said *Owen* and the said *Stoddard* as his trustee, the said *Stoddard* had not in his hands and possession any goods, effects, and credits, of the said *Owen.*

To this plea the plaintiff replies, that, at the time of the date, &c., of the said writ, he had good and sufficient reason to believe, and did in fact believe, that the said *Stoddard* had in his hands goods, effects, and credits, of the said *Owen*, which could not be attached by the common and ordinary process of law.

The defendant, in his rejoinder, sets forth the purport of the said indenture of lease between him and the said *Stoddard;* and avers that, after the said judgment, and before the commencement of the present suit, he offered the plaintiff to assign and transfer to him the said indenture, and all the sums of money covenanted thereby to be paid, upon and towards the said judgment; which the plaintiff

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refused to accept; and which was all the effects the plaintiff had good and sufficient reason to believe were deposited, &c.; of all which the plaintiff was ever well knowing, &c.

To this rejoinder the plaintiff demurs generally; and the defendant, joins in demurrer.

The cause was argued upon these pleadings, at the last May term in this county, by *Longfellow* for the plaintiff, and *Orr* for the defendant.

Longfellow. Besides the duplicity of the rejoinder in the first set of pleadings, the first plea in bar is bad. It is not sufficient to allege only that the defendant has been taken and committed in execution. It may be that he afterwards committed an escape, or that he had been liberated by taking the poor debtor's oath. It should have been averred that the plaintiff, after his com-
[* 160] mitment, *voluntarily permitted him to go at large, or that the debt has been in some way satisfied.

The second plea in bar furnishes no objection to the plaintiff's recovering judgment against *Owen;* for if the supposed trustee is discharged, or the plaintiff discontinues the suit as to him, he may still proceed to trial, judgment, and execution, against the principal debtor.

Orr. The plaintiff must derive his title to this action, after having committed his debtor in execution, from the provisions of the statute of frauds. (1) But his case is not within that statute. By the fourth section, the right to this process is made to depend on the plaintiff's discovery of goods, &c., not attachable by the ordinary process of law. But here it was made known to him that all the demands which his debtor had upon *Stoddard* had been long before legally transferred to another. Neither does the charge of neglecting to give the creditor notice, which, by the third section of the statute, is made a fraudulent transaction, apply in this case; for the debtor had given the notice of this fund long before the assignment of it. The provision, being in derogation of a common law principle, should be strictly construed.

These two sections of the statute of frauds are dependent on each other, and also on the provincial act of 32 *Geo.* 2, (2) which was in force when the statute of frauds was made, and is expressly referred to therein. But they are not dependent on the existing statute, which gives the process of foreign attachment; (3) for, by the fourteenth section of this last statute, the use of this process is

(1) *Stat.* 1788, c. 16.

(2) Vide *Ancient Charters, &c.* c. 267. (3) *Stat.* 1794, c. 65.

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limited by the regulations contained in the statute of frauds. It follows, that the statute of frauds is to be construed as if the act of *Geo.* 2 had not been repealed, and the statute of 1794 had not been made; except so far as this last gives the forms of the process; while the right of action against a debtor in execution accrues by the statute of frauds alone. It was never the intention of the statute that a creditor should have a right to commit his debtor, and to commence a process of foreign attachment, at the same time. He knew of *the credits in *Stoddard's* [*161] hands long before the commitment. He elected the latter remedy, and he is bound by his election. Many inconvenient and mischievous consequences might be shown to result from another construction.

This action was not, in fact, brought with a view to secure the effects in the supposed trustee's hands, as contemplated in the proviso annexed to the fourth section of the statute of frauds. The plaintiff knew it could have no such effect. It is a mere abuse of the process. It was essential that there should have been effects in *Stoddard's* hands; otherwise, by the act of *Geo.* 2, the plaintiff must be nonsuit; because the disclosure of no effects negatives the fraud contemplated in the preamble of the act, which is the case in the present action. For the fourteenth section of the statute of 1795 expressly refers the judgment creditor to the statute of frauds, and this again to the provincial act. Both these are law in the present case; and the second plea in bar, which is not avoided, as well as the rejoinder in support of the first plea, are a sufficient answer to the action.

As to the cause of demurrer to the first rejoinder, the defendant says that the declaration is bad. It avers that an execution issued, but it does not state whether satisfied or not. That the execution is unsatisfied is a traversable fact; and if found for the defendant, would avoid the judgment.

The replication to the first plea is also substantially bad. It does not allege the discovery of the effects to have been after the commitment. This was necessary, or the plaintiff was bound by his election; and it was necessary, too, to bring home the fraud to the debtor.

But if both were good, so is the rejoinder. It avoids the replication, and supports the bar. It negatives the neglect to make known effects in the hands of the trustee; on which alone the action could be sustained. All the facts tend to one point — the legal disposition of the property pretended to be sued for, in the hands of *Stoddard.* To make the rejoinder double, there must be

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[* 162] *two unconnected facts, either of which would of itself avoid the replication, and support the bar. (4)

If the assignment to *Mary Owen* were of itself a sufficient answer to the action, then the second plea in bar is a sufficient answer, which is not avoided by the replication to it. It is alone a complete defence; for the assignment of property shown to have been once in the hands of *Stoddard*, and the denial that any was in his hands when the action was brought, are equivalent expressions. But that the assignment might appear, the property in the hands of *Stoddard* must first be shown, as inducement to it. If the inducement is broader than is necessary, in showing notice to the plaintiff of the effects in *Stoddard's* hands, this part of the inducement may be rejected as surplusage: it does not vitiate.

The cause standing continued for advisement to this term, the opinion of the Court was now delivered by

WILDE, J. This case turns altogether on the validity of the first rejoinder; for there is nothing in the objections made to the declaration, or to the first plea in bar; and as to the second plea, it is clearly insufficient.

The declaration sets out a judgment, and avers that the same remains in full force, not reversed, annulled, or satisfied; which is substantially good, without setting out the doings of the officer upon the execution. And if this were not so, the defect must be considered a formal one, and would be cured by pleading over; the supposed deficiency in this case being supplied by the defendant's first plea, in which he alleges a commitment under the execution.

To this plea it has been objected, that it does not show a discharge or satisfaction of the debt. The answer is, that it shows execution executed, by the commitment of the body of the debtor; and the legal presumption would be, that he still remains in prison, had not the plaintiff averred the contrary in his replication.

As to the second plea in bar, it is clearly no defence for the principal to plead that the trustee, at the commencement of

[* 163] the action, had not in his possession any *goods, effects, or credits, of the supposed trustee; for the statute expressly authorizes a plaintiff to proceed to trial, judgment, and execution, against the principal, notwithstanding the discharge of the trustee. Such a plea, therefore, is altogether irrelevant; so that we are brought to the consideration of the rejoinder, upon which the merits of the whole case will be found to depend.

It has been argued at the bar, that the rejoinder is bad for du-

(4) 1 *Burr.* 317. — *Chitty on Pleading*, 511.

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plicity; and whether it is so or not, must be determined by the construction to be given to the fourth section of the statute against fraud and perjury.

According to the construction contended for by the defendant's counsel, a judgment creditor, after commitment of the debtor in execution, is not entitled to the benefit of the trustee process, unless he is able to show by evidence, independent of the oath of the trustee, that goods, effects, or credits, were deposited in his hands at the time of the commencement of the action; and that this had been first made known to the plaintiff after he had taken the debtor in execution.

If this be the true construction of the statute, it would seem difficult to avoid the objection of duplicity in the rejoinder; for one fact therein alleged is, that the plaintiff had notice of the rent due from the trustee to the principal before and at the time of the commitment; and then, again, it is alleged that the same rent was assigned, *bonâ fide*, to a stranger, before the commencement of this suit, with an averment that no other effects or credits were ever deposited in the hands of the trustee, &c.; so that the rejoinder contains two independent facts, neither of which can be rejected as surplusage, since either of them, on the construction contended for, would be alone a sufficient bar to the action.

The defendant's counsel therefore, to avoid this difficulty, must be compelled to yield one branch of his argument; and if we were of opinion that, according to the true construction of the statute, one of his propositions * is well founded, and the [* **164**] other not, then doubtless the fact introduced in support of such erroneous proposition might be rejected as surplusage. Whether the objection can be thus removed, we shall not undertake to determine, since we have been led to adopt a more liberal construction of the statute than the one contended for; and which is, in our opinion, more consistent with the probable intention of the legislature, and better suited to the ends of justice.

In the first place, then, we cannot believe that the legislature could have intended to compel a creditor, in a case like the present, or in any case, to pursue his remedy against a supposed trustee, at the hazard of losing his debt, should the trustee be able to discharge himself; because, frequently, the creditor can have no certain means of information. The principal and trustee may combine for the purpose of concealment; and that such may be the case, seems supposed by the course of proceedings prescribed by the statute giving the trustee process; for the prevention of which the trustee is put upon his oath. Besides, we find a provision in the same

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statute which authorizes creditors generally to proceed to judgmen. and execution, notwithstanding the discharge of the trustees, without turning them round to new actions. Nor do we see any reason why this provision should not be considered as applicable to a case like the present, as well as to cases of other creditors: the present process being given, it must be presumed to be given with all the privileges belonging to it, as described in the statute.

Further, the defendant, as has been before intimated, cannot be admitted to plead that there has been no deposit of goods, effects, or credits, in the hands of the trustee. This fact must be settled by the disclosure of the trustee. For if the principal were permitted to controvert it by the intervention of a plea, the plaintiff might be deprived of an important benefit; since, if the facts should be only known to the principal and the trustee, which may fre
[* 165] quently happen, the plaintiff * would have no means of maintaining the issue on his part, as the trustee could not be examined as a witness on the trial of an issue to the jury, unless first discharged from the suit.

That part of the rejoinder, therefore, which goes to controvert the existence of the trust or deposit in the hands of the trustee, must be adjudged irrelevant and inadmissible.

As to the remainder of the rejoinder, which alleges notice to the plaintiff before the commitment, although, at first view, it may seem a more plausible ground of defence, yet we are satisfied, from a careful examination of the statute, that it is not maintainable. The words of the statute are, "that whenever a judgment creditor shall discover goods, effects, or credits, of his debtor that are unattachable by the common and ordinary process of law, he shall be entitled to process," &c. This provision extends to all judgment creditors, and is not limited to cases where there have been commitments on execution.

Then at what time is the discovery here spoken of to be made? The defendant contends that it must be after the commitment, in order to justify a trustee process commenced after such commitment. But it is not so said or implied in the statute, as we can perceive. The most that can be made of any limitation as to time is, that the discovery must be made after judgment is recovered.

The defendant's counsel admits that the plaintiff, having notice of the deposit before and at the time of commitment, was then entitled to the present process; and certainly he was so entitled by the express words of the statute. This title was not lost by taking the debtor in execution, provided the plaintiff discharged him within seven days after commencing his action, as it seems he did. If

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he had failed so to do, his writ would have abated, and the defendant would have been entitled to recover treble costs.

A right of action, * clearly given, is not to be taken [*166] away by doubtful implication.

For these reasons, we are all of opinion that the rejoinder, in the first set of pleadings, is bad; and that the first plea in bar being also bad, the plaintiff is entitled to judgment.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF KENNEBECK, JUNE TERM, 1817, AT AUGUSTA.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

JOHN T. APTHORP, ESQ., Treasurer, &c., *versus* JOHN NORTH AND OTHERS.

To the validity of a coroner's bond for the faithful performance of the duties of his office, a formal approbation of the Court of Common Pleas on record is not necessary.

THIS was an action of debt upon a bond made by the defendants, *John North*, *Joseph North*, Jun., *Jonathan Pollard*, and *James North*, payable to *Peleg Coffin*, Esq., treasurer of the commonwealth, and his successors in office, for 2000 dollars, and dated July 1, 1799; with condition that the said *John* should well and truly execute the office of a coroner in the county of *Kennebeck*, to which he had been commissioned on the 28th of February preceding.

On the trial, which was had upon the general issue of *non est*

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factum, before *Thatcher*, J., at the last October term in this county, it appeared in evidence that the writing declared on was signed and sealed by the defendants on the day of its date, and was delivered to * and taken by *Joseph North*, Esq., the [* **168**] subscribing witness, into the Court of Common Pleas for the county of *Kennebeck*, of which he was the first justice, for approbation according to the provisions of law; but the same was never approved by said court, one or more of the justices doubting the sufficiency of the sureties. And at December term, 1801, of the said court, the same bond was found on the files of the clerk of the Court of General Sessions of the Peace, and was then delivered by said clerk to the said *Joseph North*, Esq., or taken by him, from the clerk in court, and carried out by him, he observing at the time that it had not been approved, and was of no validity. On the same day he returned it to *John* and *Joseph North*, Jun., stating that the court would not approve of it. Thereupon the said *Joseph North*, Jun., tore off his name and seal from the bond, and the said *John* took it and kept it. The bond was afterwards, in a former trial of this action, produced by the said *Joseph North*, Esq., and has since remained on file in this case.

Upon this evidence the judge instructed the jury that, if they believed the facts as disclosed in evidence, they ought to find a verdict for the plaintiff; and a verdict being so returned, the defendants filed their exceptions to the said direction.

Mellen, for the defendants, argued that it was necessary to the validity of this bond that it should be approved by the Court of Common Pleas for the county. (1) Without such approval, there was no assent on the part of the commonwealth, and so no contract ever completed. The sureties were offered, but they were never accepted or approved of, which was necessary to the completion of the contract. It is not unlike the case of *Payne* vs. *Cave*, (2) in which it was decided that a bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down.

But if the obligation may be said to have been accepted, still here was no delivery. The court to whom a delivery was offered refused to receive it. In other * words, they [* **169**] rejected it, and refused to put it on their files; and it was afterwards found on the files of another court, where it must have been accidentally put. Until after the bond was cancelled, and, indeed, until the commencement of this action, which was many years after the cancelling, there was no assent on the part of the

(1) Vide *Stat.* 1783, c. 43, 44. (2) 3 *D. & E.* 148.

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commonwealth, or of any person as its agent, to receive it, or to consider it as of any validity. (3)

Orr, for the plaintiff. No formal approbation of the bond by the Court of Common Pleas was necessary. When the coroner and his sureties had sealed it, and delivered it to the first justice of the Common Pleas, a right of indemnity under that bond vested in every person who might thereafter be a sufferer by the nonfeasance or the malfeasance of the coroner. The statute implies that all services performed after the bond is executed shall be valid, until the sitting of a court, when it may be approved. It then takes effect from the time of delivery, and becomes public property.

The case states that the bond was not approved. This, however, is merely an inference, and not a fact. The receipt of it by the chief justice of the court, as their organ, was an approbation of it. It is immaterial whether it was found upon the files of the Common Pleas or on those of the Sessions. In either case, it remained the property of the commonwealth, and must be presumed to have been approved.

But it is not competent for the defendants to allege that the instrument declared on is not their deed. The case finds a sealing and a delivery to the proper agent. These are the substantial requisites of a deed. The attempt of the surety to cancel it was a tortious act, as was also the taking of it from the files of the court by the officer who had returned it into the court.

The object of the statute, in requiring the approbation of the court, was to guard against insufficient sureties, but was not intended in any manner to operate as a privilege to the coroner or his sureties.

Under the plea of *non est factum*, the defendants
[* 170] * have no right to bring the approbation of the Court of Common Pleas into question. If they would rely on the want of such approbation, they should have pleaded it. They have done all that was in their power to bind themselves; they have pursued all the usual and requisite forms; and the instrument declared on is therefore their deed.

PARKER, C. J., delivered the opinion of the Court. If the fact stated in this case, that the bond declared on was offered to the Court for approbation, and was not approved, must necessarily be construed to mean that it was rejected by the Court, the inference drawn by the counsel for the defendants, that it never became effectual by a delivery, would be irresistible.

But such a construction is so inconsistent with other facts in the

(3) *Bac. Abr.* tit. *Obligation*, C, 5.— *Co.* 119, *a.*

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case, about which there is no question, that we cannot adopt it; and the fact, as stated, must be considered as meaning only that there is no evidence of record of any formal approbation by the court. And in this view of the case, which is now declared to be the true one by the judge who sat in the trial, we think there is no cause for setting aside the verdict.

The case would then be, that the bond given to secure the faithful performance of the duty of a coroner by the principal was duly executed; was delivered to the presiding judge of the Court of Common Pleas, who was a subscribing witness, and by him handed to the court. No act of disapprobation by the court is proved; and more than two years afterwards the bond was found on the files of the Court of Sessions; from whence it was taken and delivered to one of the sureties, who attempted to cancel it by tearing off his name and seal. Now, a delivery to the court, or the putting it upon the files of the court, was, in law, a sufficient delivery; because the bond is, in effect, made to the commonwealth, although nominally to its officer, the treasurer; and a reception of it by any officer of the government, if it passed regularly through the Court of Common Pleas, would be a completion of the contract. A formal act or certificate of approbation by the court is
* not made necessary by the statute. The act which [* **171**]
describes the duty and power of coroners provides that the coroner shall, before he enter upon the duty of his office, give security in the same manner as sheriffs are by law obliged to do. (4) The act defining the general powers and duties, and regulating the office, of sheriffs, provides that the sheriff shall give sufficient security, at the discretion of the Court of Common Pleas of his county, to the treasurer of the commonwealth.

It is not, then, required expressly that any record or certificate should be made, that a bond given was approved; but if such bond is found upon the files, without any evidence accompanying it that it has been rejected, and the principal has proceeded to execute the duties of his office, the presumption is violent, if not conclusive, that the bond was received by the court as the security required by the statute.

We have no hesitation, therefore, in saying that the facts reported prove the legal existence of the bond, as a contract with the commonwealth; and notwithstanding it has not been approved, in the only sense which can be attributed to the words of the report, it is binding upon the obligors.

The facts from which this legal inference is drawn being admitted, a new trial is unnecessary.

(4) *Stat.* 1783, c. 43.

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The circumstance of the bond's being found upon the files of the Court of Sessions, instead of the Court of Common Pleas, is not material; for the files of neither of those courts was its proper place of deposit. It ought to have been transmitted by the presiding judge of the court, or by his direction, to the treasury office. But if it never reached the proper depository, either from accident, carelessness, or the fraud of any of the parties concerned, it nevertheless remained in force from the time it was handed into the court, as the security required by law.

The removing it from the files and giving it to one of the obligors was an unlawful act, even upon the supposition that it had no legal force; for no one has a right to rifle a [*172] public office, and determine for himself * the value or validity of the papers. Such an act could be free from moral turpitude only if there was a sincere belief that neither the public nor individuals had any interest in the paper as a security.

Judgment on the verdict.

THE TRUSTEES OF FARMINGTON ACADEMY *versus* WILLIAM ALLEN.

One subscribed a paper with others, each engaging to pay a certain sum of money for raising a fund for the establishment of an academy; and trustees were afterwards incorporated: the said subscriber, on application of the trustees for payment of a portion of his subscription, furnished some materials towards the finishing of the building which the trustees had erected; and he was held liable to the trustees for the remainder of his subscription, on the ground of money laid out by them for his use.

THIS was a special *assumpsit* upon the following paper, *viz.*, "Town of *Farmington*, county of *Kennebeck*, December, 1805. Whereas the establishment of an academy in this part of the county for instruction in the different branches of useful learning is rendered necessary by our distance from any literary institution of this kind, and will meet the approbation of all friends to the public good, by affording the means of diffusing knowledge to the rising generation; and whereas the raising of a suitable fund by the voluntary donations of individuals is requisite, before the necessary assistance of the legislature can be obtained; — we, the subscribers, hereby engage to be accountable for the payment of the respective sums set against our respective names, as a fund for and to be applied to the

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purpose aforesaid; to be payable to such persons as shall or may be by the legislature appointed trustees to any academy situated near the centre of the town of *Farmington*, as may be granted by virtue of the funds hereby raised; and also to pay the interest yearly on such respective sums, to commence from the time of the grant of such academy."

The declaration was amended at a prior stage of the action, by adding a count for money laid out and expended, and also a count for money had and received.

The action was submitted to the decision of the Court upon the following facts, *viz.*: The defendant signed the paper declared on, and subscribed fifty dollars. * After the act [* 173] establishing the academy and incorporating the trustees was passed, (1) the trustees appointed a committee to erect a building for their use; who afterwards applied to the defendant and the other subscribers for payment of a proportionate part of the sums by them subscribed. The defendant told the committee that he had no money; but he delivered to them, in part of his subscription, a quantity of shingles, to be used on the said building, and the same were in fact so used.

Upon these facts it was agreed that if the Court should be of opinion that the plaintiffs were entitled to maintain their action, the defendant should be defaulted; and if otherwise, the plaintiff was to become nonsuit.

F. Allen, for the defendant. The case furnishes no evidence of an express promise. The payment of a small part is the only fact from which a promise can be drawn; and payment of a part, when of full age, has been held, in the case of a promise by an infant, to be no evidence of an engagement to pay the residue. (2)

There being no express promise, the next inquiry is, whether there be any evidence in the case, of such a consideration as will support an implied one; it being well established that nothing short of a legal obligation is a sufficient consideration for such a promise; although a moral obligation is a sufficient consideration to support an action on an express promise. (3) Here was neither a personal benefit to the defendant, nor a damage to the plaintiffs.

In the case of *Stiles* vs. *The Attorney-General*, the duke of *Wharton* had given to Dr. *Young* a bond for £600, in consideration of his having incurred great expenses in order to be chosen a member of the House of Commons, at the duke's desire; and Lord *Hardwicke* decided that it was not supported by any valuable con-

(1) *Stat.* 1806, c. 47.
(2) 2 *Esp. Rep.* 628, *Thrupp* vs. *Fielder*.
(3) 6 *Mass. Rep.* 43, *Andover Turnpike* vs. *Gould*.

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sideration, for Dr. *Young* could not be supposed to be a candidate for a seat in the House of Commons with any other view [* 174] but that of serving his country. (4) * So, in the case at bar, it is apparent, from the writing on which the action is brought, and from the nature of the thing, that the general interest was the only motive with the defendant for subscribing it.

In the case of *The Limerick Academy* vs. *Davis*, (5) the facts are very similar to those in the present case. There the court held that the defendant was not bound by his original subscription. Certain cases are put by the court by way of supposition, such as the "subscriber's actual acceptance of the legislative grant, as if named or descriptively included in the incorporation, he has been concerned in the subsequent proceedings," &c., which would form the foundation of an implied promise.

But the present defendant comes within none of those supposed cases, no one of the circumstances there enumerated, as furnishing grounds for a promise, existing in this case. From the case agreed it does not appear that the defendant was a petitioner, that he accepted the grant, that he was a member of the corporation, or that he in any manner renewed his original promise, otherwise than by the payment of a small part of his subscription, the effect of which has been before considered.

Cutler, for the plaintiffs, insisted that here was a good and legal consideration for the defendant's promise. The plaintiffs have laid out their own money wholly on the ground of the engagement of the defendant and the other subscribers to reimburse them. The payment of a part of the sum subscribed was tantamount to a recognition and renewal of the promise.

What was said by the court in the case of *Homes & Al., Admrs.*, vs. *Dana*, (6) applies very strongly to the case at bar: "The true ground of the action is, that, by reason of the contract, *Larkin* (the plaintiff's intestate) was led to confide in the engagement of the defendant, so far as to advance his own money for him; and the defendant and the other subscribers, having made *Larkin* [* 175] the trustee, to receive and appropriate * the money, for objects of importance to them, were bound in equity and good conscience to restore it."

The reasoning of the court also in the case of *The Worcester Turnpike Corporation* vs. *Willard* (7) goes strongly to support the principles of the present action.

PARKER, C. J., delivered the opinion of the Court. According to

(4) 2 *Atk.* 152.
(5) 11 *Mass. Rep.* 113.
(6) 12 *Mass. Rep.* 192.
(7) 5 *Mass. Rep.* 80

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the decision of the case of *The Trustees of Limerick Academy* vs. *Davis*, cited in the present argument, this action cannot be supported upon the original promise, of which the subscription paper is the evidence; for it appears, by that decision, that a promise of this sort, made to no particular person, and having only a public benefit for its consideration, is no more binding in law than it is upon the consciences of men who are base enough to refuse to perform them. That case was well decided; and we conform to it now, as far as a strict analogy holds between that case and this; so that upon the counts which are supported only by the subscription paper, the plaintiffs in this case cannot recover.

But having lately decided, in an action brought by the present plaintiffs vs. *Flint*, that a recovery might be had on a count for money paid, laid out, and expended, the same principles will apply to this case, unless there be a material difference in the facts. That case not having been reported, it is proper now to state briefly the reasons on which the decision rests, that other subscribers to this institution may see how far they can be justified in resisting payment.

In the case alluded to, the trustees, after being incorporated, and becoming seised in trust of the land which the legislature had granted on the faith of the private funds raised by subscription, proceeded to erect a building for the use of the institution. *Flint* being one of the trustees, never having dissented from any of their acts, and having, when called upon for payment, sent a man, who was a debtor of his, to work out a part of his subscription, it was thought that the recognition of *his [*176] promise, accompanied by a knowledge, on his part, that the expense was going on, authorized a recovery against him to the amount of his subscription, on the ground of money paid, laid out, and expended, to his use and at his request. It was also thought to be like the case of a man working upon the house of another, who had knowledge of his proceedings, in which case, although he could prove no express request or promise, he would undoubtedly recover for his labor.

The present case differs from the case of *Flint* only in the circumstance that the defendant was not a trustee. But he was an inhabitant of the town, and must have known of the erection of the building; and he actually advanced some part of the materials, excusing himself from paying the whole subscription only on the ground of his inability at the time. This was sufficient to justify the trustees in proceeding to incur expense, on the faith of the defendant's subscription; and having so done, they have expended money for him on his implied request; and so the case is brought

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within the principles of the decision of *Homes & Al., Admrs.*, vs *Dana*, referred to at the bar.

The case of an infant, which has been put, whose promise cannot be made valid by implication, but only by an express new promise after he comes of age, we do not think in any degree analogous. (*a*)

Defendant defaulted.

(*a*) [*Thomson* vs. *Page*, 1 *Met.* 565; and see note to *Phillips Limerick Academy* vs *Davis*, 11 *Mass. Rep.* 119.— ED.]

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*JOHN BLOSSOM *versus* NATHAN CANNON.

In support of a title to land sold by a collector for the non-payment of taxes, proof of the return of the valuation and of a copy of the assessment to the town clerk's office is indispensable.

THIS was a writ of entry on the demandant's own seisin. Trial was had upon the general issue, October term, 1815, before *Thatcher*, J. The demandant's title was derived from a source not questioned by the tenant, who claimed to hold the demanded premises under a collector's sale, for non-payment of taxes assessed thereon in the year 1799. Sundry objections were taken at the trial to the evidence offered in behalf of the tenant; all which were overruled by the judge, and a verdict being returned, pursuant to the judge's direction, in favor of the tenant, exceptions were filed by the demandant.

The two objections which were principally relied on by the demandant's counsel were, — 1. That there was no evidence of the collector's being sworn; 2. That it did not appear that the assessors had caused their assessment and a copy of the invoice or valuation to be lodged in the office of the town clerk, as required by *Stat.* 1785, c. 50, § 1. The collector in this case was appointed by the assessors of the town, pursuant to the provision in the *Stat.* 1785, c. 46, in the place of the person originally elected to that office, who had died before perfecting his collection.

It was argued for the tenant, that a collector thus appointed was not required by law to be sworn; and as to this objection, as well as the other respecting the assessment and valuation being placed on the town records, it was urged that these were matters over which a purchaser at a collector's sale had no control, and that

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whatever the effect might be as between the assessors and collector and the persons taxed, the neglect of duty on the part of officers ought not to affect the title of * one who [* 178] had purchased at a public sale by an authorized officer of the law. And if evidence of these facts was necessary to the support of the tenant's defence, it was well left to the jury, by the judge at the trial, to presume, at this distance of time, that the requirements of the law had been complied with by the officers in question. (1)

The Court were of opinion that, if a collector thus appointed was required to be sworn, it was competent for the jury to presume that fact. But the returning the valuation and a copy of the assessment to the town clerk, being a salutary and necessary regulation, essential to the citizens in general, can in no case be dispensed with. As there was no evidence offered to this point, and as the judge charged the jury generally, that the proof produced by the tenant was sufficient in law to establish his title to the demanded premises, the cause must be sent to a new trial. But considering that many years have passed since the transactions referred to, and that the present tenant was not a party to them, and had no control over them, the jury may be permitted to presume, from circumstances, that the assessors did not neglect so important a part of their official duty.

Mellen and *Boutelle* for the demandant.

Rice and *Orr* for the tenant. (*a*)

New trial granted.

(1) 10 *Mass. Rep.* 113, *Colman & Al. vs. Anderson.*
(*a*) [*Thayer vs. Stearns*, 1 *Pick.* 482. — ED.]

THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE HALLOWELL AND AUGUSTA BANK, &c., *versus* LEWIS HAMLIN AND OTHERS.

A secretary of a banking company is not a certifying officer: his copies must therefore be sworn to.

The assignment of a promissory note, in discharge of a debt due from a banking company, whose charter had expired, does not come within the provision of a law which prohibited the issuing and circulating securities by such company

THIS was *assumpsit* by the plaintiffs, a banking company,

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incorporated by an act passed June 23, 1812, in
[* 179] * which they declared upon a promissory note made and subscribed by the defendants, dated February 25, 1811, for 549 dollars, payable in fifty-seven days, with grace, to the president, directors, and company, of the *Hallowell* and *Augusta* Bank, incorporated by an act passed March 6, 1804, and upon an en dorsement thereof to the plaintiffs by the corporation last named, under the hand of *Benjamin J. Porter*, president thereof, duly authorized for that purpose.

At the trial, which was had upon the general issue at the last October term in this county, before *Thatcher*, J., the plaintiffs produced the note subscribed and endorsed as declared on; and to prove the authority of *Porter* to make the assignment, they read in evidence a copy of a vote passed at a meeting of the stockholders of the bank incorporated in 1804, holden on the 5th of December, 1814, authorizing their president to transfer to the holder of any of their bills any of their property, real or personal. This vote was certified by *David Vass*, styling himself secretary of the bank This copy was not sworn to; but a copy of a vote appointing the said *Vass* to the office of secretary was produced, and this last copy was verified by the affidavit of *Vass*, taken before a magistrate, but not certified in the manner prescribed by statute respecting depositions of witnesses. The defendants objected to the admission of these copies in evidence. It was also objected, that the charter of the bank, incorporated in 1804, having expired in October, 1812, and the statute of 1812, c. 57, § 2, 3, having prohibited any banks, whose charters had expired, from issuing or putting in circulation any securities for money, it was not in the power of that bank to transfer or assign the note in question. It was in evidence, however, that, at the time of the said assignment, the old bank was indebted to the plaintiffs in a large sum of money. The judge overruled the objections, and a verdict was returned for the plaintiffs, subject to the opinion of the Court upon these points, with several others which received no decision.

Orr and *Williams*, for the defendants, contended
[* 180] * that the books containing the votes of the corporation should have been produced and verified by affidavit, as the best evidence; but here the copy of the vote authorizing the endorsement was not attested by any person, and the law knows no such certifying officer as the secretary of a banking company. This transaction was within the prohibition of the act of 1812, c. 57, § 2, 3, and was therefore a void act.

Bond, for the plaintiffs. This note being assigned in part payment of a debt due from one corporation to the other, the transfer can

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never be considered as prohibited by the legislature. It was in no sense issuing or putting into circulation a security for money.

The president of the bank had authority, *ex officio*, to endorse this note in payment of a just debt. If not, the corporation was competent to clothe him or any other agent with authority for the purpose, and probably the directors alone. (1) Having proved by sworn testimony that *Vass* was the secretary of the corporation, copies certified by him are sufficient evidence. (2)

PARKER, C. J., delivered the opinion of the Court. In this case, by the facts reported, the plaintiffs have a right to recover, if they have proved a regular assignment of the note to them.

The assignment appears to have been made by *Porter*, the president of the old bank; but as he had not, *ex officio*, the power to transfer their property or securities, his special authority to do it in this case must be proved by legal evidence. This authority could only emanate from the stockholders or company directly, or indirectly through the directors, to whom, by the by-laws, is committed the management of the affairs of the bank; but in either case it must be proved by a vote of one or other of those bodies.

The copy of the vote of the stockholders, mentioned in the report of the case, would be sufficient evidence for this purpose, if it were properly authenticated. It is certified by *David Vass*, who is admitted to have been secretary of the company, and he certifies as such; but a secretary of a banking company is not a certifying * officer; and, indeed, no such officer is created [* 181] by the act of incorporation. The copy could therefore only be evidence, if sworn to. At the time of the trial it was not sworn to, and was therefore improperly admitted in evidence.

It has been attempted to overcome this difficulty by referring to a copy of another vote sworn to by the said *Vass*, by which vote he was appointed secretary of the meeting of the stockholders. This copy was properly admitted; but it proves nothing but the fact of the choice of the secretary, and does not in any degree affect the other copy, which was offered to show the authority to endorse; for *Vass*, as secretary, is not a certifying officer; and all copies certified by him must be sworn to. An extrajudicial affidavit would be sufficient to authenticate the paper, according to the *English* practice upon sworn copies.

It is understood that this objection is rather formal than substantial; as it is said that the plaintiffs have now in possession a copy of the vote sworn to by *Vass*. But the state of things at the time

(1) 11 *Mass. Rep.* 94, *Spear & Al. vs. Ladd.*
(2) *Swift's Law of Ev* 23. — 3 *Salk.* 154. — *Peake's Law of Ev* 93. — 2 *Esp. Re.* 665, *Marsh vs. Collnett.*

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of the trial must govern our decision; and as there was then a defect of legal evidence to prove the title of the plaintiffs in the note declared on, the verdict must be set aside, and a new trial granted.

We are of opinion that an assignment of a note, for the purpose of paying a debt, no new obligation being created by the old bank, but, in fact, the extinguishment of an old one, does not come within the prohibition of the act which prohibits the issuing and circulating of securities.

New trial granted.

THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE HALLOWELL AND AUGUSTA BANK, INCORPORATED JUNE 23, 1812, *versus* SAMUEL HOWARD.

Two corporations having the same name, the sheriff who had an execution against one of them, and served it on property of the other, was holden liable in trespass.

TRESPASS for breaking and entering the close of the plaintiffs, being the building where their banking business
[* 182] * is transacted, and taking and carrying away 1000 *Spanish* milled dollars, the property of the plaintiffs.

Trial was had upon the general issue before *Thatcher*, J., at the last October term in this county. It appeared in evidence that one *Nathan Bond*, on the 28th of February, 1815, sued out a writ of attachment against "The President, Directors, and Company, of the *Hallowell* and *Augusta* Bank," returnable to the *Boston* Court of Common Pleas at the following May term, for the recovery of the amount of certain bank notes issued prior to the 1st day of October, 1812, being bills of the *Hallowell* and *Augusta* Bank, incorporated March, 6, 1804. This writ was delivered to the defendant, sheriff of the county of *Kennebeck*, for service: the agent for the creditor, supposing it was intended to be served on the former corporation of the same name, gave directions to the defendant accordingly. The writ was served on the 8th of March, 1815, by giving an attested copy thereof to "the cashier of the old bank," who still held the books of that corporation. He had also been the cashier of the plaintiffs; but at the time of the service of the said writ, and for a month before, *John Merrick*, Esq., had been the cashier of the plaintiffs; the business of the two corporations being transacted at

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different places. The deputy sheriff who served the writ testified that he delivered the copy to *J. Dummer*.

The said *J. Dummer* had been a large stockholder in the plaintiffs' bank, but prior to the service of the said writ he had transferred the greater part of his shares, and his agent had sold the remaining shares, but the transfer of these was not entered in the books of the bank until a month after the said service.

The said *Bond* having recovered judgment in his said action, by the default of the defendants therein, for the sum of 550 dollars 44 cents, delivered his execution to the defendant, with directions to levy the same on the plaintiffs. He accordingly entered the plaintiffs' bank, and took so much of their money as was sufficient to satisfy the said execution, of which he made a due return.

* If, upon the facts, the Court should be of opinion that [* 183] the plaintiffs were entitled to recover, judgment was to be rendered on the verdict returned for them; otherwise they were to become nonsuit.

Williams, for the defendant. The action of *Bond* was, in fact, instituted against the present plaintiffs, the new corporation; and the writ was well served upon them by delivering an attested copy of it to *Dummer*, who at the time appeared by the books to be "a principal member of the body corporate." (1) The plaintiffs having thus been duly summoned, and having by their default confessed the action, the execution was properly issued against them, and legally satisfied from their effects. If they would recover back the money thus lawfully taken, they must first vacate the judgment which has been rendered against them.

Mellen and *Bond* for the plaintiffs.

PARKER, C. J., delivered the opinion of the Court. It being apparent that the legislature has created two distinct and independent corporations by one and the same name, *viz.*, "The President, Directors, and Company, of the *Hallowell* and *Augusta* Bank," it is clear that one is no more answerable for the debts of the other, than an individual would be for the debts of another who happened to have the same name and personal description.

It follows that an execution or precept intended for one, if served upon the other, is illegally served; and the officer making the service, and the creditor directing it, are trespassers. (*a*)

The ignorance of the officer does not excuse him; for in such a case he is not bound to serve the precept upon either, without the express direction of the creditor, and an indemnifying engagement from him.

(1) *Stat.* 1785, c. 75, § 8.

(*a*) [*Commonwealth* vs. *Kennard & Al.* 8 *Pick.* 133. — ED.]

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The difficulty in such cases is, to ascertain whether the judgment was or was not, in fact, rendered against the person who is taken in execution; for if it was, although the *person* was mistaken, yet the officer would be justified.

In the case before us, it does not appear of record [* 184] * which of two corporations the judgment was rendered against, by any other circumstance than that the demand, which was the ground of the action, existed before the incorporation of the present plaintiffs. But by parol evidence it clearly appears that the now plaintiffs were not defendants in the suit on which the judgment was rendered, and therefore that execution was not to be issued against them.

By the return of the officer on the writ, it appears that he summoned the cashier of the bank; and by extrinsic evidence it appears that *Dummer*, who was then the cashier of the old bank, was the person summoned. This evidence was admissible, because the fact could not be ascertained from the record; and as the officer had the same means of ascertaining the party intended by his precept, when he levied the execution, as when he served the original writ, he must be considered as illegally levying the execution upon the property of the present plaintiffs.

The circumstance that *Dummer* was a member of the new corporation, as well as cashier of the old one, is of no importance; as the officer summoned him in his character of cashier, which was applicable only to his relation to the old bank.

Judgment on the verdict.

THE INHABITANTS OF HARWICH, Plaintiffs in Review, *versus* THE INHABITANTS OF HALLOWELL, original Plaintiffs.

Expenses incurred in the support of a pauper, although within three months prior to the notice required by the statute, cannot be recovered, if they arose more than two years before the commencement of the action.

THE original action was *assumpsit* for the support of one *Ephraim Burgess*, a pauper, having his legal settlement in *Harwich* from the 31st of October, 1808, to the 15th of November, 1810, the date of the original writ. Notice was given on the 31st [* 185] of January, 1809. * The only point adjudged in the

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cause is stated in the opinion of the Court, as delivered at this term by

PARKER, C. J. The question to be decided in this case is, whether the clause in the ninth section of the act providing for the relief and support of the poor, &c., (1) which limits the action provided for in that section to two years after the cause of action arises, will admit of a construction which will cover expenses accruing within three months prior to the giving of notice, although incurred more than two years before the commencement of the suit. And we are of opinion that it will not; for, by such a construction, the obvious intent of the legislature, in establishing the limitation of two years, would be frustrated.

That intent was to extinguish the right to recover, which was given by the general provisions of the act, as to all such expenses as had been suffered to remain without suit for two years; and the allowance of three months before the notice must be considered applicable only to those expenses which have not been lost to the town advancing them, by its neglect to commence an action within the time limited by the statute. Even when not barred by the lapse of two years, the advancing town must lose all the expense it has incurred before three months antecedent to the notice given. To allow the expenses arising three months before the notice, when that time exceeds two years before the suit brought, would be to make the time of limitation two years and three months, instead of two years, as established by the legislature. Let judgment be entered for the original plaintiffs for such part of their demand as arose within two years prior to the commencement of their action. See 10 *Mass. Rep.* 411, *Billerica* vs. *Townsend.*

(1) *Stat.* 1793, c. 59.

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* THE INHABITANTS OF HALLOWELL *versus* THE INHABITANTS OF HARWICH.

Expenses incurred in the support of a pauper, more than two years before action brought, cannot be recovered, although the same plaintiffs have, in a former action, recovered from the same defendants expenses incurred for the support of the same pauper; nor without a new notice.

THIS was an action of *assumpsit* for further expenses incurred in the relief and support of *Ephraim Burgess*, the pauper mentioned

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in the preceding case; and was commenced on the 30th of August, 1815. The plaintiffs demand the amount of the expenses which arose between the 14th of November, 1810, (the time to which they recovered in the former suit,) and the 22d of November, 1814.

It was admitted that the said *Burgess*, from the time that he first became chargeable as a pauper in *Hallowell*, was at all times supported as such by said *Hallowell*, to the said last-mentioned day.

If the Court should be of opinion that the plaintiffs were entitled to recover for the whole time stated in the declaration, it was agreed that judgment should be rendered in their favor for 350 dollars; if the Court should be of opinion that they were entitled to recover for two years only next before the commencement of the action, judgment should be entered for 150 dollars; and if the Court should be of opinion that they were not entitled to recover any sum in this action upon the foregoing statement, they were to have a trial by jury, which was to be final for them.

Bond, for the plaintiffs. This being the second action between these parties for the support of the same pauper, and judgment having been recovered in the former suit by the plaintiffs, no notice need be proved to support the present action. The notice required by the statute relates exclusively to the first suit, and one notice only is contemplated by the law, where the pauper con-
[* 187] tinues to be chargeable. This may be inferred * from the cases of *Leicester* vs. *Rehoboth*, (1) and *Sydney* vs *Augusta*, (2) the want of notice not being the ground of objection in either of the cases. Judgment in the first suit gives effective operation to the notice, and determines the question of settlement. A second notice can afford no further information; and even if seasonably answered, will not open for dispute the question of settlement. After judgment, it is the duty of the town chargeable to make provision for the pauper.

The limitation of two years applies to the first suit only. This, as an action of *assumpsit*, comes within the provision of the general statute limiting personal actions; and the plaintiffs have therefore a right to recover for the expenses incurred within six years prior to the date of their writ. A different construction of the statute would encourage and require a frequency of suits not consistent with sound policy or the true interest of the parties.

But if the parties have no right to recover for all the expenses incurred within six years before the commencement of their action, it seems clear, upon any reasonable interpretation of the statute, that they may have judgment for the amount of their expenditures within two years.

(1) 4 *Mass. Rep.* 180. (2) 12 *Mass. Rep.* 316.

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Williams, for the defendants. The only effect of the former judgment is to conclude the defendants on the question of the settlement of the pauper. Notice is as necessary to be alleged and proved in a second suit as in the first. The statute furnishes no ground for the distinction set up by the plaintiffs. (3)

If, however, the Court should hold a second notice unnecessary, the limitation of two years must certainly apply to the action.

PARKER, C. J., delivered the opinion of the Court. The question presented by this case is twofold: 1. Whether the action can be maintained for the whole sum demanded, which is claimed as a reimbursement of expenses incurred from November 14, 1810, to November 22, 1814, notwithstanding the proviso in the ninth section * of the statute, which must be construed [* 188] to be a limitation of the action to the term of two years after the cause of action accrued.

It is insisted by the plaintiffs that this limitation is not applicable to a case like the present, where there had been a previous action, upon which judgment was recovered by the plaintiffs, and where the expenses sued for accrued during the pendency of the former suit.

But we are not able to make such an exception to the express provision of the legislature; nor are there any equitable reasons inducing us to wish that we had such power. The defendant town, in such suits, knows nothing necessarily, but that they are called upon to reimburse the plaintiffs for expenses, which had accrued up to the time of the commencement of the suit which is brought against them. Whether the person who has caused the expense continues to be a charge upon the town which has sued them or not, they may be ignorant. The distress which called for the relief may have been temporary, and may have ceased; or the person may have left the town where he fell into distress, and have gone to some other place. There is no continuance of the liability, therefore, in consequence of the existence of the suit; but every subsequent right of action must stand independent of that which has preceded, and must be subject to the same restrictions in the statute.

All the expenses, therefore, which are sued for in this action, and which accrued more than two years before the commencement of the suit, are barred by the proviso of the statute, which, it has been determined, will be taken notice of by the Court, without its being pleaded by the defendant; because, by the statute, the plain-

(3) 6 *Mass. Rep.* 501, *Dalton* vs. *Hinsdale.* — 5 *Mass. Rep.* 325, *Bath* vs. *Freeport.* — 3 *Mass. Rep.* 436, *Salem* vs. *Andover.* — 12 *Mass. Rep.* 334, *Mitchell* vs. *Cornville* — *Ibid.* 452, *Needham* vs. *Newton.*

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tiffs' right of action is conditional, *viz.*, that it be brought within two years after the accruing of the expense.

2. Another question is, whether the residue of the sum can be recovered, no notice having been given to the overseers [* 189] of *Harwich* before the suit brought. * And we are clear that it cannot; the notice in the former suit, or the proceedings in that suit, having no relation to this, except to conclude the defendants upon the question of settlement. For the reasons before stated, applicable to the other question, the notice should be renewed upon every new cause of action. The purpose and object of the notice is to give the town called upon the election of taking the pauper home, and supporting him within their own town. Now, the proceedings in the former suit cannot inform them that the person is still a pauper; or that he has not acquired a settlement in some other town, which may be done in several of the ways provided in the statute, in less time than elapsed between the commencement of this and the former suit. The notice to the overseers of the town sued is a *sine qua non* of the action.

The plaintiffs, then, cannot have judgment on the facts before us; but as it has been suggested that it may be in their power, on another trial, to prove the requisite notice to the defendants, a new trial is to be had for that purpose, according to the agreement of the parties. (*a*)

(*a*) [*Belfast* vs. *Leominster*, 1 *Pick.* 123. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF LINCOLN, JUNE TERM, 1817, AT WISCASSET.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

EDMUND BRIDGE *versus* HEZEKIAH WYMAN AND ANOTHER.

On the attachment of personal property on mesne process, it is necessary that such possession thereof be retained by the officer as shall make the attachment notorious; or the attachment will be vacated, as respects future attaching creditors, or purchasers without notice.

THIS was an action of *debt* upon a bond given to the plaintiff, when sheriff of the county of *Lincoln*, conditioned to indemnify him against the misfeasances and nonfeasances of the defendant *Wyman*, whom the plaintiff had constituted his deputy in the said office of sheriff.

After oyer had of the bond and the condition, the defendants plead in bar that the said *Wyman omnia performavit*, &c.

The plaintiff replies, that, on the 19th of April, 1808, *Jonathan Phillips* and others sued out a writ of attachment against one *Enoch Jones*, returnable on the second Monday of May then next, command

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ing the said sheriff, or his deputy, to attach the property of the said *Jones* to the value of 2000 dollars; which writ was on
[* 191] the same * day delivered to *John O. Webster*, another of the plaintiff's deputies, who, on the 20th of said April, attached a new ship, of the value of 5000 dollars, as the property of *Jones*, and made due return of the writ. The said *Phillips* and others having, in January, 1809, recovered judgment in their said suit for 1733 dollars, sued out their execution thereon. On the 15th of October, 1808, one *Abraham Barker* sued out his writ of attachment against the said *Enoch Jones* and one *Josiah Noyes*, returnable on the second Monday of January then next, commanding the said sheriff, or his deputy, to attach the property of the said *Jones* and *Noyes*, to the value of 500 dollars; which writ was on the same day delivered to the defendant *Wyman*, who attached the same ship as the property of the said *Jones* and *Noyes*, and made due return of the writ. The said *Barker*, in August, 1809, recovered judgment in his said suit for 444 dollars. The said *Phillips* and others, on the 23d of January, 1809, and within thirty days from the rendition of their said judgment, delivered their said execution against *Jones* to the defendant *Wyman*, then a deputy sheriff, as aforesaid, directing him to levy the same on the said ship, or any other personal property of the said *Jones*, if he could find any, and to sell it according to the command in the execution; or to demand the said ship of the person who had receipted for her to the said *Webster*; or, in case *Webster* should apply to *Wyman* for the execution, to deliver the same over to him. And the said *Wyman* received the said execution, and well knew the attachment, which had been made by *Webster*, of the said ship, and in whose custody *Webster* had placed it for safe keeping; and ought to have taken the same in execution, or to have demanded it of the person who had it in custody, or to have permitted *Webster*, on his application, to have taken the execution, that he might have taken the ship in execution, or have demanded it of the person having it in custody, so as to charge him with the value thereof in case of non-delivery thereof on demand But the said *Wyman*, regardless
[* 192] of his duty, did not levy the execution on the said * ship, nor demand it of the person in whose custody it was; and although *Webster* requested of him the execution, for the purpose of levying it upon the ship, and of demanding it of the person having the custody of it, he refused to permit *Webster* to have the execution, whereby he was deprived of an opportunity of levying it upon the ship, or obtaining the same of the person to whose custody he had committed it; and *Wyman* afterwards returned the said execution unsatisfied, by reason whereof the plaintiff became

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liable, and has been compelled to pay to the said *Phillips* and others the whole amount of their judgment, and to expend large sums of money in the defence of their action against him for the recovery thereof, amounting to 3000 dollars. And this, &c., wherefore, &c.

The defendants, in their rejoinder, allege that *Webster*, immediately after he had attached the said ship, as stated in the replication, voluntarily permitted the same to be taken out of his custody and safe keeping, and to be returned to and remain in the hands and possession of the said *Jones* and *Noyes*, who were joint owners thereof, until the said 18th of October, when *Wyman* attached it at the suit of said *Barker*, as the property of the said *Jones* and *Noyes*; and also, on the 19th of the same October, further attached the same by virtue of another writ of attachment in his hands, sued by one *George Clark* against the said *Jones* and *Noyes*, returnable on the second Tuesday of September then next, whereby the sheriff, or his deputy, were commanded to attach their property to the value of 4000 dollars; which last writ was duly returned; and in that suit, in May, 1812, judgment was rendered in favor of said *Clark* against the said *Noyes*, surviving partner of the said *Jones*, who had deceased pending said suit, for the sum of 1069 dollars; which said ship was all the goods and estate of the said *Jones* and *Noyes* of any kind which came to the knowledge of the said *Wyman*, or could by him be found within the precinct of the sheriff, while the execution aforesaid remained in his hands. And this, &c., wherefore, &c.

* The plaintiff, in his surrejoinder, alleges that *Web-* [* **193**] *ster*, after making the attachment set forth in his replication, did place and deposit the same ship in the care and custody of *Nathaniel Coffin*, Esq., for safe keeping; and the said *Coffin* thereupon, by his memorandum in writing, promised the said *Webster*, deputy sheriff as aforesaid, that he would safely keep the same, and deliver it to *Webster* on demand; and the said *Coffin* did accordingly keep said ship for *Webster*, until *Wyman* attached it, as alleged in the plaintiff's replication; and traverses the allegation of the defendants, that *Webster* voluntarily permitted the ship to be taken out of his custody, and to be returned to the said *Jones* and *Noyes*, &c., and concludes with a verification.

The defendants, in their rebutter, aver that *Webster* voluntarily permitted the ship to be taken out of his custody, and to be returned to *Jones* and *Noyes*, &c., and tender an issue to the country which is joined by the plaintiff.

In the trial of this issue before *Thatcher*, J., September term, 1815, the defendants, to maintain the issue on their part, proved that, from the time that *Webster* attached the ship, the said *Jones* and

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Noyes continued to work on the ship at their wharf as before the attachment, to complete her lading, and to fit her for sea, until *Wyman* attached her; and after that attachment they still continued the same operations, and chartered her to certain merchants, and in the latter part of November in the same year, the ship sailed from said wharf, and had never returned.

The plaintiff, to maintain the issue on his part, proved that, when *Webster* made the attachment, the ship was partly laden and not rigged, — that, on the same day, he delivered her to *N. Coffin*, Esq., for safe keeping, and took from him the following writing, *viz.*: "*Lincoln*, ss. *Bath*, April 20, 1808. Received of Mr. *John O. Webster*, a deputy sheriff for said county, the new ship, tackle, and apparel, belonging to *Jones* and *Noyes*, as she now lies at [* 194] their wharf, for safe keeping, she * being attached by said *Webster* as their property, on a suit against them in favor of *Jonathan Phillips* and others, returnable at the next May term of the Court of Common Pleas in this county, for the sum of 2000 dollars; and I promise to return her to him again on demand, or pay the amount of the execution recovered on said demand. *Nathaniel Coffin*."

The said *Coffin* transacted his business on the same wharf: his office was in sight of and near said ship, and he in daily observation of her. The ship remained in the same place from the time of *Webster's* attachment until those made by *Wyman*. All that was done upon her by *Jones* and *Noyes*, after *Webster's* attachment, was beneficial to the ship, and rendered her of greater value than when attached.

There was no proof that *Wyman* had any knowledge of the attachment made by *Webster*, until after he, *Wyman*, had attached her; nor that *Webster* requested *Wyman* to deliver him the said execution, until after the expiration of thirty days from the rendition of *Phillips's* judgment against *Jones*. And it appeared that the two debts, to secure which *Wyman* attached the ship, were caused by him to be satisfied on execution.

Upon this evidence, the plaintiff insisted that the attachment so made by *Webster* was valid and effectual; that the delivery of the ship to *Coffin*, as aforesaid, and her situation afterwards, until *Wyman* attached her, was not voluntarily returning her to *Jones* and *Noyes*; and that he had maintained the issue on his part.

But the judge instructed the jury that *Webster's* attachment, by the subsequent disposition of the ship, and the acts of said *Jones* and *Noyes*, as proved as aforesaid, was abandoned and discharged, and that the issue, on the part of the defendants, was well main

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tained. Whereupon the jury returned a verdict for the defendants; and the plaintiff filed his exceptions to the said direction.

The cause was shortly argued at the last June term * in this county by *Williams* for the plaintiff, and by [* **195**] *Mellen* and *Orr* for the defendants; and at this term the opinion of the Court was delivered by

PARKER, C. J. We are of opinion that the direction of the judge at the trial was correct, and that the verdict is well maintained by the evidence stated in the report. The attachment made by *Webster* was sufficient to make him responsible for the property to the attaching creditor; but actual custody or possession was necessary to make it valid against a subsequent attachment.

The delivery over to *Coffin* appears to have been merely nominal. The debtors were permitted to work upon the ship, and to have the visible possession of her at the time *Wyman* made his attachment; and *Coffin*, who was the servant of *Webster*, gave no notice to *Wyman*, or to any other person, that he had the custody of the ship.

If it be not necessary, in order to perfect the attachment of a ship, that the attaching officer should place a person on board, to keep possession, and notify others that the vessel is in the custody of the law, it is at least essential that the debtors should not have the management of such property, in the same manner as they would have if no attachment were made, and that some persons should be authorized and required by the attaching officer to give notice, in case a second attachment is attempted.

The effect of these nominal attachments, *viz.*, leaving the property in the hands of the debtor, and taking a receipt of some friend of his, has been frequently adverted to. They are so far valid as to bind the officer for the value of the property, and to give force to the contract between him and the person who gives his receipt for it. But with respect to strangers, other creditors, or purchasers without notice, the attachment is wholly inoperative. Such transactions are always confidential; the sheriff takes his security from the friend of the debtor; and this friend is secured by, or he relies upon, the debtor. They all act at their peril, * and have it not in their power to effect the security of [* **196**] the attaching creditor, or by such means to withhold the property from other creditors.

Wyman had full right to attach this ship; and although he also permitted her to go to sea, yet the plaintiff has not been injured thereby; for the judgments in those suits have been satisfied. Nor do we perceive that *Wyman* has broken the condition of his bond in consequence of having had the execution of *Phillips & Al.* committed to him, and returning it unsatisfied. The ship was

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gone when he received the execution; and it does not appear that he knew of the attachment made by *Webster* until more than thirty days after the judgment had expired; nor did he know, until then, that *Coffin* had become responsible to *Webster*. (*a*)

Judgment on the verdict.

(*a*) [*Sanderson* vs. *Edwards*, 16 *Pick.* 144. — *Hemenway* vs. *Wheeler*, 14 *Pick.* 408 — *Naylor* vs. *Dennie*, 8 *Pick.* 198. — *Ilsley* vs. *Nichols*, 12 *Pick.* 270. — *Sawyer* vs. *Merrill*, 6 *Pick.* 478. — *Baldwin* vs. *Jackson*, 12 *Mass. Rep.* 131. — *Train* vs. *Wellington*, 12 *Mass. Rep.* 495. — *Merrill* vs. *Sawyer*, 8 *Pick.* 397. — *Carrington* vs. *Smith*, 8 *Pick.* 419. — ED.]

JOHN O. WEBSTER *versus* NATHANIEL COFFIN.

Where one had received a ship from an officer, who had attached her on mesne process, and had promised to deliver her to the officer on demand, and he afterwards permitted the owner to continue possession, and to carry her to sea, he was holden liable to the officer upon his promise, although no demand was made on him within thirty days after judgment was rendered in the suit on which she had been attached; the officer having been held to answer to the attaching creditor.

THIS action was *assumpsit* upon the receipt and undertaking of the defendant, which is recited in the report of the preceding case of *Bridge* vs. *Wyman & Al.*, and was referred to the determination of the Court, upon certain facts agreed and stated by the parties.

The facts stated are substantially contained in the preceding case, *viz.*, the attachment of the ship by the now plaintiff, then a deputy sheriff; his delivery of it to the defendant upon his said receipt, and undertaking to redeliver it on demand; the recovery of judgment and execution by *Phillips* and others against *Noyes*; the continuance of the ship in the hands of the former owners until her sailing, in November, 1808, when the said *Noyes* sailed in her; the situation of Mr. *Coffin's* place of business; the delivery of *Phillips's* execution to * *Wyman*; his return of the same in no part satisfied; and a demand of the ship by *Webster* of *Coffin*, September 22, 1812. It is also agreed that the present defendant has paid no part of the judgment recovered by *Phillips* against *Jones*; that *Phillips* has recovered against the sheriff *Bridge* the sum of 2396 dollars, for the default of himself and his deputies in the discharge of their duty relative to the said action against *Jones*, and that *Bridge* has paid the same with additional expenses; that *Bridge* has brought his actions against *Webster* and *Wyman* and their respective sureties for indemnity; that *Wyman* attached the

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said ship at the several suits of *Barker* and *Clark*, as stated in the defendants' rejoinder in the said case of *Bridge* vs. *Wyman & Al.*; that he delivered her to one *Webb*, taking his engagement in writing to deliver the same on demand; that the actions of *Barker* and *Clark* were continued in court until long after January, 1809, when *Phillips & Al.* recovered their judgment against *Noyes*; that no other demand was ever made upon *Coffin* for the ship but that before stated; and that *Webster* had no property therein except by virtue of his attaching her at *Phillips's* suit, and that he never had any other writ against said *Jones* and *Noyes* than that sued by *Phillips*, as aforesaid.

The cause was argued at the last June term by *Williams* for the plaintiff, and *Orr* for the defendant.

Orr contended that this was a void undertaking for want of a consideration. It was said by the Court, in the case of *Phillips & Al.* vs. *Bridge*, (1) which arose out of this same transaction, that the object of such an interference is to send the vessel to sea, or, in other words, that the debtor may still have the full use of his property, notwithstanding the right of his creditors to hold it for their security.

The defendant's engagement cannot be construed beyond a promise to indemnify the plaintiff against the rights of the attaching creditor. But those rights wholly ceased after thirty days from the judgment, the *execution not having [*198] been before delivered to the plaintiff. (2) It is not unlike the liability of an endorser of a bill of exchange, or promissory note, which ceases to exist after a neglect of due diligence and notice by the holder. The sheriff neglecting to make his demand on the defendant, all his claim was gone. The authority or rights of the bailee to hold the property attached could not be greater than those of the sheriff who had made the bailment under the circumstances of the case.

Williams, for the plaintiff, contended that he was legally entitled to recover the value of the ship, which the defendant had explicitly engaged to keep until demanded by the plaintiff; or, at the least, the sum which the defendant's breach of his undertaking had been the occasion of the plaintiff's losing. The injury the plaintiff has sustained, in being compelled to pay that sum, furnishes a sufficient consideration for the defendant's promise. It was perfectly immaterial to the defendant whether the execution was delivered to the plaintiff, or to any other officer able to serve it within the thirty days.

(1) 11 *Mass. Rep.* 242. (2) 9 *Mass. Rep.* 258, *Knap* vs. *Sprague.*

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In the case of *Phillips & Al.* vs. *Bridge*, the Court say that the injury to the plaintiffs there, and of consequence to the present plaintiff, accrued when the ship was restored to the debtors, which was long before judgment was rendered in the suit upon which the attachment was made. The ship being, at the time of the judgment rendered, out of the defendant's control, a demand at that time would have been nugatory. In short, the defendant, acting as the servant of the plaintiff, must be answerable over to him, so far as by his misconduct the plaintiff has been made to suffer. (3)

The action was continued for advisement, and at this term the opinion of the Court was delivered by

PARKER, C. J. The only question which this case presents is, whether Mr. *Coffin* is exonerated from his express promise in writing to deliver the ship, which was the subject of the contract [* 199] to *Webster*, the plaintiff; * no demand having been made on him therefor, until more than thirty days had expired after the judgment, to secure which the attachment was made.

It may be observed that, a demand having been made before the present suit was commenced, the defendant is liable, according to the terms of his contract, and can only be exonerated by showing that the plaintiff himself is not liable to the attaching creditors, and so has lost his right to enforce the contract with *Coffin*. But the facts agreed show clearly that the plaintiff is liable to the judgment creditors. Indeed, the investigation made by the Court in the case formerly decided between the judgment creditors and *Bridge*, the sheriff, as well as in the case of the sheriff against *Wyman* and his sureties, in which judgment has now been rendered, leave no doubt of the liability of *Webster* to the sheriff. It is enough to make him liable, that the ship was once attached by him, and that she was not in his possession, or within the commonwealth, when the execution was about to be levied; the execution having been sued out, and a demand having been made upon *Webster* by *Wyman*, who had possession of the execution, within thirty days.

To what purpose would it have been for *Webster* to have made a demand upon the defendant, when the ship was actually at sea before judgment was rendered, and this by permission of *Coffin*, who had the opportunity of seeing the owners of the ship preparing her for sea, and must be presumed to have consented that one of them should depart with her? Had he kept the control of her until the lien of the creditor had ceased, and then had surrendered her, he would have been acquitted, as would *Webster* also. But

(3) 11 *Mass. Rep.* 219, *Jewett* vs. *Torrey.* — *Ibid* 211, *Whittier* vs. *Smith & Al.*

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Webster made himself responsible to the creditors absolutely while the legal lien continued, and *Coffin's* responsibility to him was of equal duration. Having parted with the vessel, or perhaps never having had actual possession of her, a demand of *Webster* upon him would have been nugatory.

The case of *Knap* vs. *Sprague*, which was cited by the defendant's counsel, in which the receipter of [* 200] property attached was held not responsible to a constable, is altogether different in its merits from this. There the constable was not liable on account of the first attachment, because execution was not sued out within thirty days from the judgment, and the second attachment was void; so that he had no legal or equitable claim to the property.

If Mr. *Coffin* is not indemnified, we may lament his imprudence; but the law must have its course.

Defendant defaulted.

LUCY KNOX AND OTHERS *versus* ALEXANDER KELLOCK.

In a writ of right, wherein the demandants counted upon the seisin of their ancestor, the tenant proved that the ancestor had parted with the land in his lifetime. But it appearing that such ancestor was disseised at the time of his conveyance, and that therefore nothing passed by his deed, and the action being avowed to be brought for the use of the grantees, the demandants recovered.

THIS was a writ of right, in which the demandants counted on the seisin of *Francis Waldo*, within sixty years from the 31st of December, 1811, being the date of the writ, and a descent to them from him as their ancestor.

The cause was tried on the general issue, before *Thatcher*, J., at the last September term in this county, when it was proved, on the part of the demandants, that *Samuel Waldo*, Esq., died seised of a tract of land called *Middle Neck*, of which the demanded premises are a part, in the year 1759; that the said *Francis Waldo*, one of the children and heirs of the said *Samuel*, in the year 1768, received a conveyance from the other heirs of the said tract, and became seised by virtue of the said conveyance. The pedigree of the demandants, as derived from the said *Francis*, was admitted as alleged by them in the count.

On the part of the tenant, it was proved that, in the year 1764, *John Kellock*, father of the tenant, entered and took possession of

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the demanded premises, and held the same until the year 1803, when he died seised thereof, leaving the tenant in possession, claiming the same as son and heir of his father. And, to show the title out of the ancestor of the demandants, the tenant [* 201] * offered in evidence, although objected to by the demandants, two deeds from the said *Francis Waldo*, one dated July 1, 1771, to *Alexander Wedderburn*, conveying an undivided fourth part of said *Middle Neck*, and the other dated September 9, 1770, to *John Skinner* and *Richard Jackson*, conveying an undivided moiety of the same tract; and it was admitted that the late General *Knox* was seised of the remaining fourth part. The said deeds were duly executed, acknowledged, and recorded.

On this evidence it was contended, for the tenant, that a title to the whole of the demanded premises was shown to be out of the ancestor of the demandants, and that no estate in the premises descended to them from him; and that the jury ought to be instructed to find a verdict for the tenant.

On the part of the demandants, it was contended that, inasmuch as the said *Francis Waldo*, at the time of executing the said deeds to *Wedderburn*, *Skinner*, and *Jackson*, was disseised by the said *John Kellock*, as aforesaid, nothing passed by said deeds; and as the action was brought for the benefit of the said grantees, the demandants were well entitled to recover.

The judge instructed the jury to find for the demandants, and a verdict being so returned, the tenant filed exceptions to the said instruction, and moved for a new trial on that ground.

Orr, for the tenant. In a writ of right, the seisin of the ancestor is material; and if disproved, this is fatal to the demandants' claim. For the tenant, it is sufficient to show that their ancestor in his lifetime parted with the fee to a stranger; because such evidence would falsify the count in a material point. In that case, there could be no descent to the heir, and the claim of the demandants must fail.

In the case at bar, *Francis Waldo*, the demandants' ancestor, conveyed the demanded premises to *Wedderburn* and others; there could, therefore, be no descent to the heirs of *Waldo*. It is not for these heirs to allege that nothing passed by the deeds of [* 202] their ancestor, nor * is it necessary that the tenant should derive a title from *Wedderburn*. After the lapse of more than forty years, it is to be presumed that the tenant's ancestor was confirmed in the estate by *Wedderburn*.

It does not appear that *Waldo* was ever disturbed upon the covenants in his deed to *Wedderburn*. Nor have his heirs suffered by

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them, and they cannot now be held to answer. They have, therefore, no interest whatever in the demanded premises.

It is suggested that the action is instituted by the demandants for the benefit of the grantees of their ancestor; but nothing appears in the case to authorize the suggestion. It is merely assumed.

A declaration on the demandants' own right is essentially different from one in right of his ancestor. In the case of *Wolcott & Al.* vs. *Knight & Al.*, (1) it is held that the tenant may plead a deed of the demandant to a stranger, in bar of a writ of entry on his own seisin; and that the demandant may avoid the bar by replying that nothing passed by the deed. But it is not in the mouth of the heir to allege that nothing passed by his ancestor's deed: he cannot maintain a writ of right for the imaginary benefit of others, who have made no claim, and who have no perceptible interest in the suit. The demandant must derive a right from the person whom he alleges to have been seised. (2)

The seisin of the ancestor, as alleged, must be certain. The case of *Barre* vs. *Reynold*, cited in *Litt.* § 514, is in point, where justice *Herle* is represented to have said to the grand assize, "If you find the ancestor of *John* [the demandant] was not seised in the time that the demandant hath pleaded, you shall inquire no further upon the right; but if you find that he was seised, then you shall inquire further," &c.

The issue, in the case at bar, is on the mere right, in which every thing may be given in evidence but collateral warranty. (3)

Mellen for the demandants.

Per Curiam. The title of the demandants to the land in question is well made out, and, indeed, is acknowledged
*on the part of the tenant, unless the conveyances to [*203] *Wedderburn* and others have defeated it. As there is nothing in the case on which to ground a presumption that the tenant derives any title under those grantees, it must be intended that he holds only under the title by disseisin acquired by his father.

Can, then, the demandants maintain their right in this action upon the evidence in the case? In *Wolcott & Al.* vs. *Knight & Al.*, referred to in the argument, which was a writ of entry, and where the facts were similar to those in the case before us, it was held that the deeds of the ancestor could in no view have defeated the right of action of the demandants. Nor does any distinction occur to us, as to this point, between a writ of entry and a writ of right. If the tenant is permitted to show that the ancestor of the

(1) 6 *Mass. Rep.* 418. (2) 3 *Black. Comm.* 195.
(3) 3 *Wilson*, 419, *Tyssen* vs. *Clarke*.

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demandants had conveyed the land in question, it is competent to the demandants to show that nothing passed by those deeds of their ancestor.

Judgment on the verdict.

JOHN HALL *versus* HENRY LITTLE.

Foreigners, who have never been in the *United States*, are within the exception of the statute for the limitation of personal actions, and may bring their action within the time limited by the statute, after their coming within the *States*.

To this action of *assumpsit*, besides the general issue, the defendant pleaded that he did not make the promises alleged by the plaintiff at any time within six years before the commencement of the plaintiff's action.

The plaintiff replied that, at the times of making the several promises in the declaration mentioned, he, the said *Hall*, was in foreign parts beyond the seas, and without any of the *United States*, *viz.*, at *Antigua*, in the *West Indies*, and had continued and remained beyond seas, without any of the *United States*, from thence to the time of the purchase of his writ.

To this replication the defendant demurred, and as-
[* **204**] signed * for cause, that the plaintiff is a foreigner, and never was an inhabitant of, or resident in, this or any other of the *United States*. The plaintiff joined in demurrer.

Bellard, for the defendant, argued that, the plaintiff being a foreigner, the provision in the statute of limitations did not extend to him. It was intended only for the relief of our own citizens. It contemplates their *return* to this country, which is considered as an impediment *removed*. Neither of these could be predicated of one who had never been in the country.

S. E. Smith, for the plaintiff. The statute has not excluded foreigners from the benefit of the provision, nor is there any reason, consistent with good policy and the comity of nations, why they should be excluded. This was the point taken in the case of *Strithorst* vs. *Graeme*, (1) upon the *English* statute of limitations; and the court there say, "If the plaintiff is a foreigner, and doth not come to *England* in fifty years, he still hath six years, after his coming to *England*, to bring his action; and if he never comes to

(1) 3 *Wils.* 145.

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England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death."

Per Curiam. The provision of the act for the limitation of personal actions, &c., (2) which is relied on by the plaintiff, is that the act "shall not be understood to bar any infant, feme covert, person imprisoned, or beyond sea, without any of the *United States*, &c., from bringing either of the actions before mentioned within the term before set and limited for bringing such action, reckoning from the time that such impediment shall be removed." It is probably not an uncommon notion that this provision was not contemplated to extend to foreigners. But the authority cited from *Wilson's* Reports in the argument is conclusive on the construction of the *English* statute of limitations. The expressions of that statute are like those of ours; and this latter must receive the same construction. (*a*)

Replication adjudged good.

(2) *Stat.* 1786, c. 52.

(*a*) [See *Revised Statutes*, c. 120, § 6. — *Bulger* vs. *Roche*, 11 *Pick.* 36. — *Wilson* vs. *Appleton*, 17 *Mass. Rep.* 180. — ED.]

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* *Ex Parte* JOHN NEAL, ESQ.

A justice of the peace was fined for not returning a recognizance taken by him, until the second day of the term.

"ORDERED, that *John Neal*, Esq., one of the justices of the peace for the county of *Lincoln*, pay a fine of four dollars, for neglecting to return a recognizance taken by him and returnable to this Court; he not having delivered the same, or caused it to be delivered, until Wednesday, the second day of the term; and although present in Court, having given no sufficient excuse for his negligence; and that he stand committed until the payment of the said fine."

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JOHN JEFFRIES AND OTHERS *versus* ISAAC RANDALL.

It is a good cause of challenge to a juror, in the trial of a real action, in which the jury are to inquire into the value of the land, had no buildings or improvements been made by the tenant, and the increased value of the same, by reason of such improvements, that such juror is interested in a similar question; but if the party neglects to take the objection before the trial, and to put the juror on the *voir dire*, the exception comes too late after the trial, unless it appears that the party made the requisite inquiry, and failed of discovering the fact before the trial.

THIS was a real action, in which a verdict was returned for the demandants at the last September term in this county, and also the increased value of the demanded premises, by virtue of the buildings and improvements made by the tenant, &c., and also the value thereof had no buildings or improvements been made by the tenant, &c., pursuant to the provisions of the statute of 1807, c. 74, § 3.

The cause stood over to this term for judgment; and now the demandants move the Court that the verdict may be set aside, and a new trial had; because that one *George Coombs* was allowed to sit as a juror in the trial of the action, and that he was interested in a similar question as occupant.

By the fifth section of the statute before referred to, it is enacted "That no person shall be allowed to sit upon a jury for the trial of any such action, where the value of the buildings and improvements are to be ascertained, or the value of the premises to be estimated by the verdict, where such person shall be inter
[* 206] ested * in a similar question, either as proprietor or occupant; but the same shall be good cause of challenge to such juror, any law, usage, or custom, to the contrary notwithstanding."

The Court took time to consider the motion, and afterwards observed that they had at first doubted on the sufficiency of the interest objected to the juror, since it was not suggested that he was party to any action pending, in which a similar question could arise; but on perusing the provision of the statute, it was apparent that the legislature intended to exclude from juries, in the trial of causes of this description, not only such as were interested, prepossessed with an opinion, or of kindred to either party, but had extended its caution to such as, from their being liable to be interested in a similar question at some future time, might have their affections excited in the trial of a cause.

The objection stated to this juror is made by the statute a good cause of challenge; but we think it comes too late after a verdict. The oath which. by the statute of 1807, c. 139, § 9, is to be put

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to any juror before the trial, on motion of either party, reaches this objection. He is to be sworn, "whether he is any way related to either party, or hath formed or given any opinion, *or is sensible of any particular interest or prejudice* in the cause;" and if he does not satisfy the court of his indifference, he is to be struck off the panel.

If, in this case, we had evidence that the juror acted under the influence of improper motives or principles, we should set aside the verdict; or had the demandants made the requisite inquiry on the *voir dire*, and failed of discovering the fact, which would have disqualified the juror, it would have been within the equity of the statute to grant them relief at this stage of the action; but having omitted to avail themselves of their rights when the jury was impanelled, the motion cannot now obtain. (*a*)

Motion overruled.

(*a*) [*Amherst* vs. *Hadley*, 1 *Pick.* 38. — ED.]

[* 207]

* *Ex Parte* RICHARD LEIGHTON.

A person to whom, as a *non compos*, the judge of probate has appointed a guardian, is still liable to be sued in a civil action, and to be committed in execution.

THE said *Leighton* was brought from the prison of the county, upon a writ of *habeas corpus*, on which the keeper of the prison had returned that he was committed on an execution issued upon a judgment against him in a civil action, a copy of which accompanied his return.

It appeared that *Leighton*, having been duly found *non compos*, the judge of probate for this county had appointed a guardian of his person and estate, pursuant to *Stat.* 1783, c. 38, § 3; and that the action in which the said judgment was rendered was commenced after the appointment of a guardian, as aforesaid.

The Court, after looking into the statute, and the case of *Thacher & Al.* vs. *Dinsmore*, (1) held the return sufficient, and *Leighton* was remanded to prison.

(1) 5 *Mass. Rep.* 299.

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COMMONWEALTH *versus* TIMOTHY HILL.

One deaf and dumb may be convicted of larceny.

THE defendant was indicted for a larceny, and being set to the bar for his arraignment, the *Solicitor-General* suggested to the Court that he was deaf and dumb, but that the evidence would prove him of sufficient capacity to be a proper subject for a criminal prosecution, and that he had formerly been convicted of a larceny; and he moved that one *Nelson*, then in Court, and an acquaintance of the prisoner, should be sworn to interpret the indictment to him, as it should be read by the clerk. The indictment was accordingly read by a sentence at a time, and *Nelson*, having been sworn, explained its purport to him, making signs with his fingers, &c. After which the Court ordered the trial to proceed, as on a plea of not guilty.

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* GEORGE REID AND WIFE, Appellants, *versus* SALLY BORLAND, Executrix.

An instrument purporting to be a last will and testament, revoking all former wills, must have the same attestation, &c., to operate as a revocation, as is requisite to give it validity as a will.

THIS was an appeal from a decree of the judge of probate for this county, allowing and approving the last will and testament of *John Borland*.

After an issue to the country on the sanity of the testator, and a verdict for the executrix, another issue was formed to the court on the revocation of the same will.

The evidence of a revocation was a posterior instrument, executed by the testator, purporting to be his last will and testament, in which also he expressly revoked all former wills by him made. This latter will had been offered for probate by the present appellants, and disallowed, as not duly witnessed, within the requisition of the statute; (1) as to which it appeared that the latter will was attested by three subscribing witnesses, but that one of them did not subscribe in the testator's presence.

(1) *Stat.* 1783, c. 24.

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Orr, for the appellants, argued that, although this instrument might not be duly witnessed as a last will, yet it might avail as a revocation of the former will now offered for probate. The three witnesses saw and heard the testator execute and publish it. They are competent and credible, and the facts are well established by their testimony. The words of the statute, as to instruments of revocation, do not require that the witnesses subscribe in the presence of the testator.

Mellen, for the respondents, contended that the instrument, offered as evidence of the revocation of the will now in question, could not have that operation. Our statute on this point is a literal copy from the *English* statute of wills, and it has been repeatedly decided, and is perfectly settled, in *England*, that a second * will, whereby lands are disposed of, as is the case here, [* 209] to amount to a revocation of a former one, must be such a one as would be effectual to pass lands, within the devising clause of the statute; and must be witnessed, and otherwise qualified, as that clause requires. (2)

And the Court being of this opinion, the decree of the judge of probate was affirmed, and the papers remitted to him for further proceedings in the matter. (*a*)

(2) *Powell on Devises*, 631, 646. — 1 *P. Will.* 343. — 2 *Black. Comm.* 396.

(*a*) [*Laughton* vs. *Adams*, 1 *Pick.* — *Very* vs. *Very*, 3 *Pick.* 374. — *Brown* vs *Thorndike*, 15 *Pick.* 388. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1817, AT CASTINE.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. SAMUEL PUTNAM, } JUSTICES.
HON. SAMUEL S. WILDE, }

JOSIAH HOIT *versus* JOSIAH HOOK, JUN.

The certificate of the district judge of the *United States* Court, that an officer, who had seized property as forfeited, had reasonable cause for the seizure, has no operation to bar an action by the successful claimant, unless the property be restored.

THIS was an action of trespass, for taking and carrying away twenty-one oxen, one cow, and one steer, the property of the plaintiff. The general issue was pleaded, and liberty reserved and allowed to give in evidence any special matter in justification, as it pleaded.

At the trial of this issue, which was had before *Wilde*, J., at the sittings here after the last June term, it appeared that the defendant, at the time of the taking, &c., was collector of the port of *Penobscot*, and duly qualified to act in that office; and that the said cattle were

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seized by his order, as liable to forfeiture and condemnation, to the use of the *United States*.

The defendant read in evidence a copy of a decree of the district judge for the district of *Maine*, a copy *of [*211] which came up in the case, and relied for his justification on the certificate of the said judge, that there was reasonable cause for the seizure, &c.

[The said decree recites the libel filed by the district attorney in behalf of the *United States*, in which it is alleged that the now defendant ordered the said cattle to be seized, for that, on the 22d of September, 1814, certain citizens of said states, unknown to the said attorney, attempted to transport the same to *Castine*, then occupied by the enemies of the *United States*, being an article of provisions, intended for the supply and support of the said enemies, whereby they had become forfeited, &c. A second count in the libel alleges an attempt to transport the same cattle to some place in *New Brunswick*.

After public notice, the now plaintiff came into the District Court, claimed the cattle, and traversed the allegations in the indictment; and issues being joined by the district attorney, a verdict was returned that the allegations in the libel were not supported.

Whereupon it was decreed by the district judge that the cattle were not liable to forfeiture; and it appearing to the court that there was reasonable cause of seizure, and that an expense of 384 dollars and 43 cents had been incurred for the necessary sustenance and custody of said cattle, it was further ordered that 151 dollars 57 cents, being the net amount of the sales of the cattle, after deducting the expenses incurred and allowed as aforesaid, be paid over to the claimant.]

A verdict was taken for the plaintiff by consent of parties, subject to the opinion of the Court, upon the question of law applicable to said supposed matter of justification. And if the Court should be of opinion that the said certificate of the district judge was sufficient in law to justify the defendant in seizing said cattle, and selling the same, and retaining from the amount of the proceeds of the sale the said sum of 384 dollars 43 cents for the sustenance and custody of said cattle, agreeably to the decree and direction of the said district judge, the verdict was to be set aside, and the plaintiff *to become nonsuit; otherwise judgment [*212] was to be entered according to the verdict.

Perham, for the defendant, contended that his conduct was justifiable, as being merely the performance of a duty enjoined upon him by the government of the *United States*, of which he was an officer.

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By *U. S. Stat.* 12 *Cong.* c. 129, § 2, the attempt to transport any articles of provision from any part of the *United States* to any place in *Upper* or *Lower Canada*, *Nova Scotia*, or *New Brunswick*, is prohibited, and such are declared forfeited, &c. And by § 3, collectors of the several ports are authorized to seize such articles so attempted to be transported, &c.

By *U. S. Stat.* 5 *Cong.* c. 128, § 89, when, in cases of seizure, judgment shall be given for the claimant, if it shall appear to the court, before whom the trial shall be, that there was a reasonable cause of seizure, the person who made the seizure shall not be liable to any action, suit, or judgment, on account of such seizure; provided the goods be forthwith returned to the claimant. The same provision is reënacted by *U. S. Stat.* 13 *Cong.* c. 93, § 7.

In this case, the District Court having directed the cattle to be sold, it was impossible for the collector to return them. He did what was equivalent; he forthwith paid over the proceeds to the claimant, deducting only the costs of keeping them, as allowed by the court. Had they not been sold, the expense of keeping them would have exceeded their value, and there must have been a total loss of the property.

But the plaintiff has misconceived his remedy in bringing his action in this Court. The defendant did his duty in instituting the process. After it was commenced, it was out of his control, and he is not answerable in any other forum. If the plaintiff was dissatisfied with the issue of his claim in the District Court, he should have sought his remedy in the courts of the *United States* having appellate jurisdiction. It is humbly insisted that the decision of the District Court, upon a matter confessedly within its juris-
[*213] diction, and not appealed from, * cannot be animadverted upon or called in question in this Court.

Mellen, for the plaintiff, admitted that there had been an order of the District Court for the sale of the cattle; but as they were not perishable articles, there was no authority vested by law in the Court to make such an order. The cattle having been decreed not liable to forfeiture, the claimant had a right to the possession of them in kind. It is no excuse or defence against this right, that the support of them would have exceeded their value. That was no concern of the claimant. The provisions of the statute of the *United States*, protecting their officers in cases of this kind, are expressly on the condition that the articles seized are forthwith restored. The certificate of the judge, as to a reasonable cause of seizure, is of no avail; is entirely without effect, unless this condition be absolutely complied with. That certificate makes no part of the judge's decree; it is, then, difficult to conceive what remedy the claimant

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could have had by applying to a court of appellate jurisdiction, for a further remedy on that process. When the jury, by their verdict, had supported the claim, the District Court had nothing further to do in the cause but to award a restoration of the cattle. In taxing the costs of keeping, and deducting them from the proceeds of the cattle, it acted wholly without its jurisdiction.

Per Curiam. The decree of the judge, founded on the verdict of the jury, having liberated the proporty seized, it ought to have been restored to the claimant. The certificate of the judge, of reasonable cause, can operate to bar an action only when the property is restored, according to the proviso in the statutes. The deduction of the expenses does not appear to be justified by any law; and the sale of the property, under an order of the judge, which appears to have no legal authority, cannot affect the plaintiff's right to recover the full value of the chattels of which he has been deprived.

Judgment on the verdict.

[*214]

*GEORGE HALIBURTON *versus* THE INHABITANTS OF FRANKFORT.

A citizen, who furnished cattle to a public enemy, at the request of the selectmen and other citizens of a town, in compliance with the exactions of such enemy upon the town, and to prevent the execution of his threats of violence, acquired thereby no right of action against the town for his indemnity.

THIS was an action of *assumpsit* for a yoke of oxen, sold and delivered by the plaintiff to the defendants.

The cause was tried on the general issue before *Thatcher*, J., at the sittings here after June term, 1815.

The evidence at the trial was, in substance, as follows: In the early part of September, 1814, there being then an open war between the *United States of America* and *Great Britain*, a detachment of the *British* army and navy took possession of the town of *Castine*, lying at the entrance of *Penobscot* River; and having the command of the river, they exacted certain contributions of cattle and vegetables for their support, from the town of *Frankfort* with other towns adjoining the river, threatening violent treatment if their demands were not complied with. At the request of the selectmen of the town, and some others who had been appointed, by a voluntary meeting of a number of the inhabitants, a committee

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to treat with the *British* forces, the plaintiff furnished the yoke of oxen, for which he demands payment in this action, as part of the said contributions; and the same were delivered, with others, in compliance with the said exactions. There was no act of the town, in its corporate capacity, authorizing the said contributions, requesting individuals to furnish them, or recognizing the act of furnishing them, as done in behalf of the corporation.

A verdict was taken for the plaintiff, subject to the opinion of the Court upon the evidence reported by the judge; and if, in the opinion of the Court, the plaintiff had maintained his action, judgment was to be entered on the verdict; otherwise the plaintiff was to become nonsuit.

Wilson, for the plaintiff, argued that, as the demand made by the enemy was on the town in its corporate or municipal
[*215] character, and as the plaintiff's property was *appropriated to the satisfaction of that demand, it was reasonable and just that the town should reimburse him for what he had thus advanced for their benefit, and had applied to their use. In the confusion and hurry of such a scene, it was impossible to obtain a legal vote of the town; but in this case every thing was done, which the circumstances admitted, to pledge the faith of the town. There was a request of the selectmen, with the addition of a committee of the principal citizens.

M'Gaw, for the defendants, insisted that they were under no legal obligation, in their corporate character, to indemnify the plaintiff. The mischief threatened, in case of non-compliance with exactions of the *British* forces, must have fallen on individuals, not on the corporation. At any rate, here was no previous request, nor after recognition, of the plaintiff's act; and nothing can be clearer than that, if one advances his money to save the property of another, without the request of that other, he submits himself, in respect to the money so advanced, wholly to the courtesy and liberality of him for whose benefit he made the advance.

PARKER, C. J., delivered the opinion of the Court. However meritorious the plaintiff's claim may be, and whatever obligations may rest upon the inhabitants, in honor and equity, to pay him for property advanced to purchase the safety of the whole, we are not able to perceive any legal principle upon which his action can be maintained. There was no contract by the inhabitants, nor by any person authorized to make one for them. The selectmen acted in their individual capacity; the transaction being wholly out of the sphere of their official duty.

It may be doubted whether, if a vote had been passed in a regular town meeting, to pay for the property thus sacrificed, a tax

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founded on such vote would be legal; for the demand was not of a nature to affect the inhabitants in their corporate, but only in their individual, capacity. The danger threatened was to the property, not of the town, but of individuals. A voluntary * agreement amongst the inhabitants would have been [*216] binding, because founded on a meritorious consideration; but a corporate vote might be questioned upon such a subject. The verdict must be set aside, and the plaintiff be called.

Plaintiff nonsuit.

THE INHABITANTS OF BREWER *versus* THE INHABITANTS OF NEW GLOUCESTER.

If an original writ against the inhabitants of a town, of which a deputy sheriff is one, be served by the sheriff, it is a good cause of abatement.

ASSUMPSIT for the support of a pauper. The defendants pleaded, in abatement, that *Robert Nevers*, one of the inhabitants of *New Gloucester*, was, at the time of the service of the original writ in this case, a deputy sheriff, under *Richard Hunnewell*, Esq., the sheriff of the county of *Cumberland*, and that the said *Hunnewell* served the said writ on the said inhabitants.

The plaintiffs demurred generally to this plea; and the defendants joined in demurrer.

Perham for the plaintiffs.

M'Gaw for the defendants.

Per Curiam. The statute, describing the duty and power of coroners, (1) directs that all writs and precepts, when the sheriff or either of his deputies shall be a party to the same, shall be served by the coroner. As the law provides that, when judgment is recovered against the inhabitants of a town, execution may be levied upon the property of any inhabitant, each inhabitant must be considered as a party, within the meaning of the statute referred to, when the suit is by or against the town in its corporate capacity. (a)

Writ abated.

(1) *Stat.* 1783, c. 43, § 1.

(a) [*Sutton* vs. *Cole*, 8 *Mass. Rep.* 96. — *Odiorne* vs. *Wade*, 8 *Mass. Rep.* 115. — *Lufkin* vs. *Haskell*, 3 *Pick.* 356. — *Bank* vs. *Cook*, 4 *Pick.* 405. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTIES OF PLYMOUTH AND BRISTOL, JULY TERM, 1817, AT PLYMOUTH

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. CHARLES JACKSON, } JUSTICES.
HON. SAMUEL PUTNAM, }

COMMONWEALTH *versus* ISRAEL MORSE.

The bailee of a sheriff, who has received of him personal chattels attached, and given an accountable receipt for the same, with a promise to redeliver them to the sheriff on demand, has no such property in such chattels as will support an indictment for the stealing thereof from such bailee, as his chattels.

THE defendant was indicted for stealing an ox, the property of which was alleged in the indictment to have been in one *Cromwell Leonard.*

At the trial, which was had before *Wilde*, J., at the last October term in the county of *Bristol*, it was in evidence that the general property in the ox was in one *Olive Morse ;* that, the day before it was taken away by the defendant, it was attached by one of the deputy sheriffs of the county of *Bristol* as the property of the said *Olive Morse*, at the suit of the said *Cromwell Leonard*, and delivered by the deputy sheriff to the said *Leonard*, who gave to the deputy

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sheriff his receipt for the same, thereby promising to be accountable for the ox, and to redeliver the same on demand; and
* that the ox was taken by the defendant from the said [* 218] *Leonard's* barn-yard.

The judge instructed the jury that this was evidence of a special property in *Leonard*, sufficient to support the indictment; and they thereupon found him guilty. The judge ordered the cause to stand continued; that, if this direction to the jury should, in the opinion of the full Court, be deemed incorrect, the verdict might be set aside.

Whitman, for the defendant, argued that *Leonard* had no property in the ox. The general property was in *Olive Morse*; the special property in the deputy sheriff. Judgment upon this indictment would be no bar to a prosecution for stealing the same ox from the general owner.

The Solicitor-General said the indictment was pursuant to universal practice. He thought, too, that *Leonard*, having the lawful custody of the ox, and being answerable for its safe keeping, the verdict might be maintained.

PARKER, C. J., delivered the opinion of the Court. The indictment alleges that the article stolen was of the goods and chattels of *Cromwell Leonard*. The evidence proved that the only interest which *Leonard* had in it was derived from the custody which he had undertaken for a deputy sheriff, who had attached the ox as the property of *Olive Morse*. The question presented by the motion for a new trial is, whether the allegation in the indictment, of property in *Leonard*, is sufficiently maintained by this evidence.

That the allegation is material, has not been questioned; and it appears by the books on criminal law, that in all indictments for larceny, the articles alleged to be stolen must be averred to be "of the goods and chattels" of the right owner, if known; or of the goods and chattels *cujusdam ignoti*, which form of indictment contains an implied averment that the owner is not known. (1)

By the same books, it will appear that the averment will be made out by proving that the goods stolen * were [* 219] either the general or special property of the person averred to be the owner. But the averment, being material, must be proved in order to support the indictment.

The only question, then, is, whether the report of the case by the judge shows that the ox stolen was of the goods and chattels, or, in other words, was the property, of *Cromwell Leonard*. It was not his property absolutely, for he had nothing but the possession, not

(1) 2 *H. H. P. C.* 182. — *Cro. Eliz.* 490, *Long's* case.

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claiming any title to it. The special property was in the deputy sheriff who made the attachment. There is no third species of property. *Leonard*, therefore, was the mere servant of the deputy sheriff, to keep the property attached for him; having no legal interest in it, and no right to maintain an action for it, if taken out of his custody, as was decided in the cases of *Ludden* vs. *Leavitt*, (2) and *Warren* vs. *Leland*. (3)

It follows that the evidence at the trial was not sufficient to support the indictment. The verdict must be set aside, and a new trial granted. (*a*)

(2) 9 *Mass. Rep.* 104. (3) *Ibid.* 265.

(*a*) [The above decision is clearly wrong. — See the note to *Ludden* vs. *Leavitt*, 9 *Mass. Rep.* 4th ed. p. 102. — One may be guilty of larceny of his own goods from a bailee or servant; (2 *Russ. Crim. Law*, 155, 156, 157. — *Rex* vs. *Bramby*, *Russ. & Ry.* 478. — *Rex* vs. *Wilkinson*, *Russ. & Ry.* 470;) and the indictment may allege the property to be in the servant or bailee. — 2 *Russ.* 155, note (h). — 2 *East*, *P. C.* c. 16, § 90, p. 164. — ED.]

ALICE DAVOL *versus* HUMPHREY HOWLAND.

A wife, divorced for the adultery of her husband, is entitled to dower in all the lands of which he has been seised at any time during the coverture.

IN this action, the said *Alice*, styling herself late the wife of *Pardon Davol*, demands her dower in a certain parcel of land; and alleges that the said *Pardon*, formerly her husband, was seised in his demesne as of fee of the premises during the coverture of the said *Pardon* with the demandant; that she has been divorced from the bonds of matrimony, for the cause of adultery committed by him; and that, since the said divorce was had, and a month before the purchase of her writ in this case, *viz.*, on, &c., at, &c., she demanded of the said *Humphrey*, tenant in possession, and having the next immediate estate of freehold in the premises, to assign and set out to her her reasonable dower in the premises; which the said *Humphrey* hath refused to do, but hath deforced, and still deforceth, her thereof.

The tenant pleads in bar, that, at the time when the
[* 220] * said *Alice* was divorced from the bonds of matrimony as aforesaid, the said described premises were not the land of the said former husband of her, the said *Alice*.

To this plea in bar the defendant demurs generally, and the tenant joins in demurrer.

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Bassett, for the demandant. By *Stat.* 1785, c. 69, § 5, it is enacted that, "When the divorce shall be for the cause of adultery committed by the husband, the wife shall have her dower assigned her in the lands of the husband, *in the same manner as if such husband was naturally dead.*" But a seisin at any time during the coverture gives the wife a right to dower after the death of her husband, whatever alienations may have been made of the land.

Tillinghast and *J. M. Williams*, for the tenant, argued that the statute referred to lands of which the husband was seised at the time of the divorce; what is added has respect only to the *remedy*, which is to be the same as if the husband was dead. The expression in the old statute, of which the one now in force is a revision, is, "All such lands, &c., as her husband was seised of, &c., *at any time during the marriage.*" (1) Nor was this change of phraseology adopted without reason. Purchasers of real property, in which the widow of the grantor may be entitled to dower, in case she survives her husband, may estimate by mathematical rules the value of such a possible encumbrance, and he may make his contract at a price resulting from such calculation. But how are the chances of a divorce of this kind to be calculated? Besides, divorces may be, and it is believed sometimes are, obtained by collusion. It is, then, against a wise policy to extend the provision of the statute in this case by construction.

The declaration in this case is greatly defective. The allegation of the divorce is too general. The divorce is a matter of record, and the record should have been referred to, with a *prout patet*, &c. As it is here stated, it cannot be known in what county or at what time it was decreed.

Holmes, for the demandant, in reply. The declaration [* 221] * was copied from a precedent of the late Chief Justice *Parsons*, when at the bar. (2) The divorce is sufficiently alleged, to have been traversed, which would have brought up the record. As to the construction of the statute, the intention of the legislature clearly appears, that a woman divorced from her husband for cause of adultery in him, shall have a right of dower in the same degree as if her husband were naturally dead.

PARKER, C. J., delivered the opinion of the Court. The point presented by the pleadings is, that the husband of the demandant, although seised of the land in which dower is claimed during the coverture, had alienated it before the decree of divorce took place; and the legal inference attempted to be drawn is, that the wife is

(1) *Mass. Laws*, vol. ii. Appendix, 961.
(2) *Precedents of Declarations*, 313.

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not dowable, but of lands of which the husband continues seised until the dissolution of the marriage.

The counsel for the tenant have argued that the legislature intended, by the language of the provision in question, to limit the right of the wife to the lands which remained the husband's at the time of the divorce.

But this is too narrow a construction; for the whole sentence manifestly shows an intention to place the divorced wife upon the same footing with the widow, in respect to dower. The construction contended for would operate severely upon an unfortunate woman who feels obliged to seek a separation from an unworthy husband, and might prevent her from asking for the relief which the law designs for her. For if she remains with her husband, after he has forfeited all claim to her respect and confidence, until his death, she will have dower in any lands he may have alienated during the coverture. But if she withdraws from the connection, she may be cut off from all dower; for it would be in the power of the husband, after committing the crime which is a legal cause of divorce, to transfer all his real estate, and thus deprive his injured wife of the means of living. Such a construction of
*222] * the statute would be unnatural and injurious. Nor is it to be supposed that the legislature intended to place in the hands of a criminal husband a power to coerce a continued cohabitation, by exposing the wife to want, if she should avail herself of the liberty afforded her by the law.

Plea in bar adjudged bad

BENJAMIN CHASE, Appellant, &c., *versus* BARZILLAI HATHAWAY.

It is the duty of the judge of probate, before the appointment of a guardian to one as a lunatic, *non compos*, &c., to give notice to the party, that he may be heard on the question, whether such appointment be necessary or proper.

Of proceedings in Courts of Probate.

[When a commission issues from the Probate Court to take an inquisition, it should contain an order that notice be given to the party who is the subject of it, that he may appear before the selectmen. All orders and decrees of the Probate Court must be recorded. — ED.]

THIS was an appeal from a decree of the judge of probate for the county of *Bristol*, assigning the said *Hathaway* to be guardian

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of the appellant, who had been adjudged and certified by the selectmen of the town of *Berkley*, of which he was an inhabitant, to be incapable of taking care of himself.

The reasons of appeal, filed in the court below, pursuant to the statute, were as follows, *viz.*: 1. That he was not, at the time of the adjudication of the said selectmen, an idiot, non compos, lunatic, or distracted person, and incapable of taking care of himself; 2. That he had no notice of the time and place when and where the said selectmen made their pretended inquisition and adjudication; 3. That notice was not given to him that any representation or adjudication was exhibited in said Probate Court against him, nor notice that any decree would be made by said court affecting his rights, and that he was divested of his liberty and property without any opportunity afforded him of being heard upon the subject; 4. That the said *Barzillai Hathaway* was not a suitable person to be a guardian.

Baylies, for the appellant, relied principally upon the want of notice to him of the inquisition of the selectmen of *Berkley*, and of the proceedings and decree of the Probate Court; and he contended that, although this notice was not expressly prescribed by the statute, * yet that it was matter of common [*223] right, and the want of it would avoid the whole proceedings. Relying upon this point, he offered no evidence in support of the first and fourth reasons of appeal.

Tillinghast, for the respondent. As this proceeding was wholly a matter of judicial discretion in the judge of probate, it must be presumed that every necessary and proper measure was adopted by him previously to passing the decree, although the record does not exhibit every minute step in the process. It is worth consideration, too, what desirable effect notice to a person *non compos*, and so unable to avail himself of such notice, can produce.

The opinion of the Court was delivered by

PARKER, C. J. This case comes before us on an appeal from a decree of the judge of probate for the county of *Bristol*, whereby the respondent *Hathaway* was appointed guardian of the person and estate of the appellant, found to be a person *non compos mentis*. The proceedings of the judge of probate are founded upon the return of an inquisition, made by the selectmen of the town of *Berkley*, of which *Chase* is an inhabitant; and the inquisition was taken pursuant to a commission from the judge of probate, which issued upon the application of certain inhabitants of said town, according to the provisions of the statute of 1783, c. 38, § 5.

It does not appear, by the copies of the probate proceedings produced by the appellant, that he was present before the judge of

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probate, or before the selectmen when their inquisition was taken, or that he had any notice from the selectmen of the time and place appointed by them to make their inquiry, or from the probate office of the return of the commission, or of the time assigned by the judge for considering and acting upon it. Upon the supposition that some material papers had not been produced, we should have postponed the hearing upon this appeal until full copies were produced; but it being admitted that the copies actually produced show the whole of the transactions in the probate
[* 224] * office, we must decide upon the sufficiency of these transactions to support the decree of the judge, which is appealed from.

The want of notice to the supposed *non compos* is the subject of two of the reasons assigned for the appeal; and another contains a denial of the fact that the appellant is of unsound mind. On this latter we should hear testimony, and decide upon the liability of the appellant to the process under the statute, if the proceedings in the Probate Court had been correct in substance and in form. But being of opinion that the second and third reasons of appeal are sustained in point of law, we make no inquiries respecting the state of mind of the appellant; because, upon another inquisition, which may be taken and returned, and adjudicated upon by the Probate Court more correctly, the fact can be better ascertained than before us, under the present circumstances.

There being no provision in the statute for notice to the party who is alleged to be incompetent, by reason of insanity, to manage his estate, it seems that the judge of probate did not think such notice essential to his proceedings. But we are of opinion that, notwithstanding the silence of the statute, no decree of a Probate Court, so materially affecting the rights of property and the person, can be valid, unless the party to be affected has had an opportunity to be heard in defence of his rights.

It is a fundamental principle of justice, essential to every free government, that every citizen shall be maintained in the enjoyment of his liberty and property, unless he has forfeited them by the standing laws of the community, and has had opportunity to answer such charges as, according to those laws, will justify a forfeiture or suspension of them. And whenever the legislature has provided that, on account of crime or misfortune, the public safety or convenience demands a suspension of these essential rights of the individual, and has provided a judicial process, by which the fact shall be ascertained, it is to be understood as re-
[* 225] quired * that the tribunal, to which is committed the duty of inquiring and determining, shall give opportu

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nity to the subject to be heard in support of his innocence or his capacity.

It has been intimated that notice to an insane person would be of no avail, because he would be incapable of deriving advantage from it. But the question upon which the whole process turns is, whether *he is* insane; for the presumption of law is, that every man is of sound mind until the contrary is proved; and it being possible that interested relatives might falsely suggest insanity, with a view to deprive the party of the power of disposing of his estate, that very possibility should be guarded against by personal notice to him, when practicable, that he may expose himself to the view of the judge, and prove, by his own conduct and actions, the falsity of the charge.

We should think it advisable, at least, that whenever commissions shall issue from the Probate Court to selectmen, to take an inquisition, they should contain an order that notice be given to the party complained of, that he may appear before the selectmen. This would be conformable to the practice of the Court of Chancery in *England.* It is held there to be *the privilege* of the party who is the object of a commission of lunacy to be present at the execution; (1) and in a case before the lord chancellor, he inclined to quash the inquisition, the commission not having been executed near the place of abode of the lunatic, and the order that he should have notice having been disobeyed. (2) A hearing before the selectmen, however, may not be essential, although expedient, as the inquisition is not conclusive, and there is another opportunity to traverse it.

But whether notice by the commissioners is essential or not, we are clear that it ought to be given before the adjudication in the Probate Court, and that without it such adjudication is null and void. A notification, served and returned in the manner practised with civil processes, would be sufficient; the time ought to be prescribed by the judge of probate.

*In chancery, it has been held that a traverse to the [*226] return of an inquisition is a *right by law*, although the lord chancellor is not dissatisfied with the return upon the evidence; an order was therefore suspended, for the purpose of taking the traverse. (3) This is done, in *England*, by carrying the case into a court of common law, and taking the verdict of a jury. With us the judge of probate would try the question.

Indeed, it would seem strange that the whole estate of a citizen might be taken from him, and committed to others, and his personal

(1) 12 *Ves. Jun.* 455.—3 *Atk.* 6, 7. (2) 7 *Ves. Jun.* 261. (3) 5 *Ves. Jun.* 450.

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liberty be restrained, upon an *ex parte* proceeding, without any notice of the pendency of a complaint, upon a suggestion of lunacy or other defect of understanding; while the depriving him of the minutest portion of that property, or the slightest detention of his person, would be illegal upon a charge of crime, or of a breach of a civil contract, unless all the formalities of a trial were secured to him by the forms of process, and the regular execution of it.

We have been surprised, of late, to find an irregularity in the probate offices, in several of the counties, which we think it important should be corrected in their future proceedings. It consists in the omission to enter of record orders and decrees, which often have an essential and final effect upon property to a very considerable amount. In the case now before us, it appears that no formal decree was ever passed, declaring the appellant *non compos*; or, if passed, that the only evidence of it rests in the recital which precedes the letter of guardianship. In a late case in *Cumberland*, the only evidence of a decree, allowing and approving a last will and testament, was of the same nature. This seems to us as irregular as it would be for a common law court to issue execution, without any evidence of a judgment except what might be contained in the execution.

A Court of Probate, although not technically a court of record, ought to have a perfect record of all its orders and de-
[* 227] crees; and it was for this purpose, principally, * that the constitution established the office of register. Orders of notice, among other things, should be recorded; or, if not, should be filed, with the return upon them; and in all important decrees, if previous notice has been given, that fact should be recited in the decree.

We have been thus particular, with a view to produce uniformity of practice in a court whose duties and jurisdiction affect, at one time or another, every estate in the community. And it is the more important that this should be attended to in the probate offices, as any material defect will render the proceedings null at any period when they shall be brought in question; it having been determined that orders and decrees of those courts may be avoided by plea, they not being, like judgments at common law, reversible by writ of error.

Decree reversed

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THE INHABITANTS OF HANOVER *versus* ISAAC TURNER.

If the overseers of the poor relieve the wants of the wife, whose husband has a legal settlement in another town, an action lies at common law for the town, whose overseers furnished the relief, against the husband, notwithstanding the statute remedy against the town wherein he is settled.

If a citizen of this commonwealth removes into another state, for the purpose of obtaining a divorce from his wife, on a ground which would not justify a divorce here, a decree of divorce so obtained is considered as merely void in this commonwealth.

THIS was an action of *assumpsit*, for sundry supplies furnished by the plaintiffs to *Rebecca Turner*, the defendant's wife, for her necessary support and maintenance.

Trial was had upon the general issue, before *Wilde*, J., at the last October term at *Plymouth*. The plaintiffs proved the defendant's marriage with the said *Rebecca*, and that they lived together some years in the said town of *Hanover*, until about the year 1804 or 1805, when the said *Rebecca* left the defendant, and has since lived separate. They then proved that the defendant had grossly abused and cruelly treated his * said wife while [* 228] she lived with him, which was the cause of her leaving him; and that the supplies mentioned in the plaintiffs' declaration were furnished at the expense of the plaintiffs, and at the request of the said *Rebecca*, who, in her application to the selectmen or overseers of the poor of said town of *Hanover*, informed them that her husband, who before that time had removed to *Townsend*, in the county of *Middlesex*, was of sufficient ability to repay the said town for such supplies, and ought to do it.

The defendant proved that, previously to the time of furnishing said supplies, he had gained a settlement in said *Townsend;* and that the overseers of the poor in *Hanover*, immediately after furnishing the supplies, notified the overseers of the poor in *Townsend* that the said supplies had been so furnished to the said *Rebecca*, she being in need of relief, and residing in said *Hanover*, and having her legal settlement in said *Townsend;* and they called upon them to refund to the plaintiffs the amount of said supplies.

The defendant further proved, that, in January, 1808, he removed from said *Townsend* to *Rockingham*, in the state of *Vermont*, where he resided (except that he twice returned to said *Townsend* for short times) until February, 1809; that, at the January term of the Supreme Court of Judicature, in the county of *Rutland*, and state of *Vermont*, he obtained a decree of divorce from the bonds of matrimony between him and the said *Rebecca*.

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Upon this evidence the judge instructed the jury, if they were satisfied by the evidence of the defendant's gross abuse of his wife, and that she could not live with him in safety, that any one had a right by law to furnish her with necessary supplies and maintenance at the expense of the defendant, and that he was bound by law to pay for the same; that the plaintiffs, having furnished such supplies, might recover the amount of the defendant, notwithstanding their notification to the overseers of *Townsend*, and although [* 229] they might also be * entitled to an action against that town; the judge being of opinion that the plaintiffs might maintain their action upon an implied *assumpsit* at common law.

As to the decree of divorce, the judge instructed the jury, that, if they were satisfied that the defendant removed to *Vermont* merely for the purpose of procuring a divorce; and that the pretended cause for divorce arose, if it ever did arise, within this commonwealth, and not in the state of *Vermont;* and that the said *Rebecca* was never within the jurisdiction of said Supreme Court of *Vermont;* then, and in such case, the said decree of divorce must be considered as fraudulently obtained, and that it could not operate so as to dissolve the marriage contract between the parties.

If these instructions to the jury were right, judgment was to be entered upon the verdict returned for the plaintiffs; but if otherwise, the plaintiffs were to become nonsuit.

Thomas, for the defendant, contended that the supplies having been furnished since his divorce was obtained, he was not answerable for them; and that if he was answerable, it was to *Townsend*, and not to *Hanover*, whose immediate remedy was against *Townsend*, the place of his settlement.

Winslow, for the plaintiffs. This action is not brought under our statutes for the maintenance of the poor; but for necessaries furnished the defendant's wife, which he is bound by the common law to reimburse, whether it be a town or an individual that has furnished them. The decree of divorce was wholly fraudulent, and will not be countenanced within the jurisdiction of this commonwealth.

PUTNAM, J., delivered the opinion of the Court. In this case, the defendant contends that he is not liable, — 1. Because he has been divorced, *a vinculo matrimonii*, before the supplies were made to the said *Rebecca*; and, 2. If the divorce was of no validity, the plaintiffs have their remedy against the town of *Townsend*, where the defendant is settled, and not immediately against him. [* 230] By the statute of 1793, c. 59, § 9, overseers of * the poor are required to provide for the immediate comfort

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and relief of all persons residing or found in their town not belonging thereto, but having lawful settlements in other towns, when they fall into distress and stand in need of immediate relief; and the towns where such persons have their settlement are subjected to the payment of such expenses. The plaintiffs found the said *Rebecca* in want of the necessaries of life, and supplied her; and we have no doubt but they might have recovered payment from the town to which she belongs.

But we are satisfied that the remedy is cumulative, and that the plaintiffs may also have their remedy against the defendant. It does not appear but that the defendant may defend this action, as well as if it were brought against him by the town where he belongs; and we perceive no benefit, but much inconvenience, which would arise from the proposed circuity of action.

The principal question is, whether the defendant is exonerated in consequence of the divorce which he has obtained in *Vermont*.

By the laws of *Massachusetts*, divorces from the bonds of matrimony are not to be allowed, as in *Vermont*, for extreme cruelty; and it has not been suggested that the defendant had, by our statute, any cause for a divorce against his wife. From what appears, she might have been entitled to a divorce *a mensa et thoro*, for his extreme cruelty. Aware of this, the defendant went to *Vermont* (as the jury find) for the purpose of obtaining a divorce there. It appears that he sometimes returned, to take care of his affairs here, while the proceedings there were transacting; and as soon as the object was obtained, he returned to his estate in *Massachusetts*. And it does not appear that his wife was ever within the limits of *Vermont*. She can be considered a subject of that state merely constructively, in consequence of the residence of her husband.

We are satisfied that his residence in *Vermont* was temporary, and that his domicile continued here. If * he [* 231] had been absent for years in a foreign country, or in other states of this Union, for lawful purposes of business, *animo revertendi*, no question would arise of a change of domicile; *a fortiori* when his temporary absence was for the purpose of evading the laws of this commonwealth, to which he owed allegiance.

It is a general rule, that the laws of a state apply to all who are within its limits; and those who have a temporary residence are considered as subjected to the laws of the state, while their residence continues. (1)

This applies, however, to laws made for the preservation of the

(1) *Hub. De Conflictu Legum*, lib. 1, tit. 3, § 2.

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peace of the state, and does not extend to rights and duties arising from the laws of the state where such persons have their domicile. These remain obligatory upon the subject, notwithstanding a temporary absence.

If we were to give effect to this decree, we should permit another state to govern our citizens, in direct contravention of our own statutes; and this can be required by no rule of comity. (2)

We are therefore of opinion that the divorce, thus obtained by the defendant, is of no validity here, and does not exonerate him from his liability to support his wife. Judgment is to be entered according to the verdict. (*a*)

(2) *Hub. ubi sup.* 3d *axiom.*

(*a*) [*Rex* vs. *Wm. Martin Lolly*, 1 *Russ. & Ry.* 236. — *Beazly* vs. *Beazly*, 3 *Hag. Eccl. R.* 439. — *Barber* vs. *Root*, 10 *Mass. Rep.* 265. — *Jackson* vs. *Jackson*, 1 *Johns.* 424. — *Borden* vs. *Fitch*, 15 *Johns.* 121. — *Bradshaw* vs. *Heath*, 14 *Wend.* 407. — *Tovey* vs. *Lindsey*, 1 *Dow.* 124. — *M'Carthy* vs. *De Coix*, 2 *Russ. & Mylne*, 620. — *Warrender* vs. *Warrender*, 9 *Bligh.* 89. — *Dorsey* vs. *Dorsey*, 1 *Chand. L. R.* 287. — *Pawkins* vs. *Wilson*, 13 *Johns.* 192. — *Story, Conft. Laws*, 2d ed. 298—306. — See *Revised Statutes*, c. 76, § 39. — *Harteau* vs. *Harteau*, 14 *Pick.* 181. — ED.]

PELEG JENNEY *versus* CALEB JENNEY.

It is a good bar to an action on a replevin bond, that the plaintiff in replevin entered his action, that the Court of Common Pleas gave judgment against him, from which he appealed, and before the sitting of the court appealed to he died.

THIS was an action of debt on bond, given by the defendant, as surety with one *Gerrish*, to the plaintiff, a deputy sheriff of the county of *Bristol*. Upon oyer of the bond, with its condition, it appeared to be a replevin bond, in the form prescribed
[* **232**] by the statute, * with the condition that *Gerrish* should prosecute the suit.

The defendant, in his plea in bar, sets forth the entry of the action at the Court of Common Pleas, to which it was returnable, and a judgment of that court, from which an appeal was regularly claimed by the said *Gerrish*, plaintiff in replevin, and allowed. He then avers that, before the sitting of the court to which the appeal was made, the plaintiff in replevin, who was principal in the bond, died.

To this plea in bar the plaintiff replies in a general demurrer, which is joined by the defendant.

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Nye for the plaintiff.

J. M Williams for the defendant.

PARKER, C. J. The question to be decided in this case is, whether the matter contained in the plea is a sufficient bar to the action. And we are satisfied that it is. For although, by law, the cause of action survived, yet we think that it was not a duty of the administrator of the plaintiff in replevin to enter and prosecute the action at the Supreme Judicial Court, until summoned thereto by the defendant in that suit; who might by process have compelled the administrator to come in, or, in case of his default, after notice, he would have had judgment for a return of the chattels replevied, and would have recovered his damages out of the goods and estate of the deceased, in the administrator's hands. And if judgment had not been otherwise satisfied, he might then have resorted to his action upon the bond.

The writ, by the common law, abated by the death of the plaintiff; and by our statutes, although the cause of action survived, the action itself could only be restored by the act of the executor or administrator, if he voluntarily came in, or of the defendant, if, upon suggestion of the death of his adversary, he had moved for a citation against them.

If the facts would have admitted of it, the present plaintiff, who was defendant in the replevin suit, should have replied a judgment recovered, after notice to the *administrator; and if no administration had been granted, as has been suggested, he should have applied to the judge of probate, for letters of administration to some one who could have answered to the suit. As the case now stands, he has not answered the plea in bar, which is a good defence unanswered, and judgment must be against him. [*233]

Plea in bar adjudged good.

EBENEZER HAWES, Plaintiff in Error, *versus* ELISHA HATHAWAY.

A judgment in an action of debt, brought upon a former judgment which was erroneous, cannot be reversed for the error in the former judgment.

ERROR upon a judgment rendered in the Circuit Court of Common Pleas for the county of *Bristol*, in which the said *Hathaway* was plaintiff and the said *Hawes* defendant.

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HAWES, Plaintiff *in Error*, *vs.* HATHAWAY.

It appeared that an action was first sued by *Hathaway* before a justice of the peace, and that judgment was rendered on the return day of the writ, without any adjournment or continuance of the action, although *Hawes* was out of the commonwealth from the service of the writ until after the said judgment was so rendered against him, and had no agent or attorney within the commonwealth, nor any notice of the said suit. Afterwards *Hathaway* brought an action of debt upon the said last-mentioned judgment, before the same justice of the peace; and judgment being again rendered against *Hawes*, he appealed to the Circuit Court of Common Pleas, where, after a continuance, *Hathaway* recovered the judgment, to reverse which the present writ of error was brought; and the foregoing facts were relied on, as showing the last judgment erroneous.

By the Court. The second judgment before the justice of the peace well supports the judgment of the Common Pleas, [* 234] which is complained of, and which * cannot therefore be reversed. And the second judgment before the justice is maintained by the first, which is valid until reversed. The course to be taken is first to obtain a reversal of the original judgment by writ of error; and the plaintiff in error may then apply for a review of the action, in which the Common Pleas rendered the judgment, brought before us by this process. There is at present no ground shown on which that judgment can be reversed.

Nye for the plaintiff in error.

J M. Williams for the defendant in error.

Judgment affirmed. (*a*)

(*a*) [*Lazell* vs. *Miller*, 15 *Mass. Rep.* 207. — ED.]

JOHN LE BARON, Plaintiff in Error, *versus* NAOMI CROMBIE AND ANOTHER, Administrators, &c.

Evidence of the testimony given by a witness in a former trial of the same cause, the witness having in the mean time been convicted of an infamous crime, is not to be received.

THIS was a writ of error, brought to reverse a judgment of the Circuit Court of Common Pleas for the county of *Plymouth*, in an action wherein the plaintiff in error was original defendant, and the said administrators original plaintiffs. The action was commenced

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and tried before a justice of the peace, and carried to the Circuit Court by appeal. At the trial before the justice, one *John Richards* was sworn, and testified as a witness for the plaintiff. After that trial, and before the trial in the Circuit Court, the said *Richards* was convicted of larceny, and remained incompetent to testify at the said last trial, by reason of the said conviction.

To supply the defect of his testimony, witnesses were offered and admitted to testify what the said *Richards* declared under oath at the former trial. This was objected to by the plaintiff in error; and the Court having overruled the objection, a bill of exceptions was tendered and certified by the presiding justice of the Circuit Court, containing the foregoing statement. The admission of the said evidence is the only error assigned, except the general error.

* *Eddy* for the plaintiff in error. [*235]

Holmes for the defendants in error.

PARKER, C. J., delivered the opinion of the Court. The question distinctly brought before us by this writ of error is, whether the declarations of a witness under oath, competent at the time, but being incompetent by infamy at a subsequent trial, are legal and admissible. We are all of opinion that they are not, and that the opinion of the Circuit Court of Common Pleas cannot be supported, either by authority or upon sound principles of justice or policy.

The general rule, that heresay evidence is inadmissible, cannot be disputed; indeed, it is so clearly established, and uniformly recognized, as to have become a familiar maxim.

There are exceptions to the rule; but these are as well known as the rule itself; and the present case does not resemble any of them. In *England*, when one who has been a witness is dead, his testimony may be revived by living witnesses, who were present at his examination in a former trial of the same cause between the same parties. It is so laid down in several authorities, and particularly in *Buller's Nisi Prius*, (1) and in a late case in the Common Pleas. (2) As the declarations of the dead man were made under oath, in a cause then pending, the proof of those declarations, in a subsequent trial, was thought to be not strictly hearsay evidence, which is generally the proof of conversation held by a party not at the time under oath

But this species of evidence is certainly not free from inconvenience; for the imperfect recollection of what has been said at another time, and especially the want of knowledge of the manner of expression, the countenance, and the conduct, of him upon whose relation the proof of the fact is to rest, may materially affect, and perhaps sometimes totally change, the character of the testimony

(1) *Bull. N. P.* 295 (2) 3 *Taunton's Rep.* 261.

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We do not mean, however, to deny this, as a rule of evidence, or as an exception to the general rule; although no decision, to our knowledge, has taken place upon it in this common-
[* 236] wealth, * nor do we remember any practical admission of the principle by the courts of this state.

We believe that in *England* the proof of such declarations has been limited to the case where the principal witness is dead; for we find no case where such evidence has been admitted, when the testimony of the principal witness has been lost by any other cause. Indeed, the depositions of witnesses, taken in chancery, in a cause pending there, the witnesses being competent at the time, are not admitted at the trial of the same cause in the courts of common law, if, in the mean time, the witnesses have become incompetent, by reason of an interest devolved upon them without their agency. Much less could the *viva voce* declarations of a witness so situated be proved by another witness; for this would certainly be much inferior evidence of what he had said than his own words, committed to writing under all the cautions of a solemn examination. (3)

Admitting it to be the rule here, as well as in *England*, that the declarations of a dead witness, made under oath at a former trial, may be proved, it by no means follows that declarations so made by a witness still living, but who has become incompetent, can be so received. The cases are not sufficiently analogous to prove each other. The case of a supervening interest would be the most favorable; but that is not admitted in *England*. (*a*)

In the case of infamy, occurring by a conviction between the first and second trial, the objection is certainly stronger; for the crime committed proves a state of mind capable of crime; and as it is impossible to ascertain when the moral sense was corrupted, the antecedent character of the witness is affected by the conviction, to a degree which would render his testimony on a controverted point of little use to a jury. It is true, they may judge of his credibility; but it would not be safe to try experiments upon the credulity of jurors, by committing to them suspicious testimony; and exceptions need not be multiplied to those rules which are already known and practised upon.

[* 237] * It may also be considered as a forcible objection to this species of testimony, that it brings with it a necessity of making such public inquiries into the character of the person

(3) *Bull. N. P.* 239. — *Salk.* 286.

(*a*) [The depositions of persons who cannot attend to testify, by reason of sickness, insanity, or other cause, or who have gone abroad, or beyond the reach of process, or cannot be found, have by the courts in *England* been admitted in evidence. — 1 *Stark. on Evidence*, 2d *Lond.* ed. 265; 3d ed. 310, and the cases there cited. — And see *Gold vs. Eddy*, 1 *Mass. Rep.* 1, 4. — ED.]

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whose declarations are sworn to, as are very inconvenient in a court of justice, and ought as much as possible to be avoided. (*b*)

Upon the whole, as the admission of the evidence objected to is not justified by any authority, nor by the principles of justice and sound reason, we think the judgment of the Circuit Court of Common Pleas is erroneous. Let a *venire facias de novo* issue, returnable at the bar of this Court.

(*b*) [This decision is supported by no authority, and is inconsistent with general principles. Mr. *Starkie* says, "The deposition of a witness may be read, not only where it appears that the witness is actually dead, but in all cases where he is dead, for all purposes of evidence; as where diligent search has been made for the witness, and he cannot be found, where he resides in a place beyond the jurisdiction of the court, where he has become lunatic or *attainted*." — 1 *Stark. Ev.* 2d *Lond.* ed. p. 265; 3d *Lond.* ed. 310. — So, although the attestation of a subscribing witness, made after conviction of an infamous crime, is a mere nullity, yet, if made before conviction, it will be available after conviction, and the hand-writing may be proved. — 1 *Stark. Ev.* 2d *Lond.* ed. p. 135. — *Jones* vs. *Morgan*, 2 *Str.* 283. — In all such cases, the proper inquiry seems to be, whether the witness was competent at the time of his attestation, or giving of testimony. His subsequent conduct, and the consequences of it, will only affect his credibility. To determine whether testimony be admissible, we must look to the condition of the witness when it was given. Generally speaking, if the witness was then competent, but has since become incompetent, the testimony will be received, and so, on the contrary, if then incompetent, it will be rejected. — ED.]

JOHN CLARK *versus* SIMON S. GOODWIN.

It is no bar to an action of debt upon judgment, that the bail of the defendant in the former suit had surrendered him, and that he was in prison by virtue of such surrender, and liable to be taken upon the execution, when the plaintiff commenced the second action, and arrested the defendant's body.

THIS was an action of debt on a judgment of the Circuit Court of Common Pleas for the county of *Plymouth*. The defendant pleads in bar, that, after the recovery of the judgment declared on, the plaintiff sued out his writ of execution thereon, which was returned unsatisfied; whereupon he sued out a writ of *scire facias* against the defendant's bail, who surrendered the defendant, who was thereupon, by order of court, duly committed to prison, there to remain for the space of thirty days, to be taken in execution if his creditor should think proper so to take him; that he continued in prison the said thirty days; that, while he was so a prisoner, the plaintiff wantonly and oppressively, and with a design to injure and oppress the defendant, and to subject him to great expense and damage, and further hold him in imprisonment, purchased the writ

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in the present action, and wantonly and oppressively arrested his body thereon; when the plaintiff was entitled by law to sue out an execution upon the same judgment, and when the defendant was liable to be arrested, or to have his property taken upon such execution.

[*238] The plaintiff replies, that he purchased his said writ * in the present suit for the purpose of securing and enforcing the payment of the money due to him on the judgment declared on, and traverses the defendant's allegation, that he wantonly and oppressively, and with a design to injure and oppress the defendant, and to subject him to great expense and damage, purchased his said writ, and wantonly and oppressively arrested the defendant's body thereon, &c.

To this replication the defendant demurs, and the plaintiff joins in demurrer.

Sampson for the plaintiff.

The Solicitor-General for the defendant.

PUTNAM, J., delivered the opinion of the Court. The creditor has an election to attach the property or the body of the debtor on mesne process, as well to secure his debt as to compel the debtor to answer; and by law the lien created by the attachment continues for thirty days after judgment. During that time the creditor may deliberate and determine what future process will be most for his advantage. If he sues an execution, he may direct it to be levied upon his body, if the debtor does not produce estate to the creditor's acceptance. He is not obliged to take the body, or property which was attached on the original writ. If he should omit to do it, the only consequence would be, that he would lose the lien created by the attachment. Thus, if, within the thirty days, he should find it more for his benefit to take property than the body which was originally arrested, he may waive the one and take the other. So, if he attached property on mesne process, and should afterwards think the title not good, or that it would be better to compel the debtor to raise money from the property than to take it himself, he may waive his attachment, and use the execution as a *capias ad satisfaciendum* instead of a *levari facias*. These remarks tend to illustrate the position, that a creditor is not compellable to pursue, after judgment, the remedy indicated by his mesne process

[*239] In the case at bar, the defendant contends that the plaintiff, having a right to an execution, is obliged to * resort to it, and cannot *maintain* an action of debt within the thirty days after the judgment, because a new judgment would only give a right to an execution.

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It has been decided (1) that debt lies on judgment *within* or after the year. The case referred to by Chief Baron *Comyns* is in the 43 *Ed.* 3, 2, *b*, where it is said, "If one recovers upon a statute merchant, and the statute gives an execution by *capias*, and also against the land, that notwithstanding he may have a writ of debt." And there may be good reason for it. The interest of the money arising on the judgment can only be recovered by an action of debt upon the judgment. For the execution issues for the principal sum only; and property may be discovered which may be secured by the process of foreign attachment, which could not be touched by an execution against the debtor and the estate in his hands.

It may happen that the action of debt may be brought for the purpose of oppression only, and not for the better recovery of the money due. In such case, all the officers concerned would merit censure. But the case at bar is, by the demurrer of the defendant, confessed to be not of that iniquitous kind, but one brought to secure the debt, and not wantonly; and we do not perceive that there is any legal objection to it.

Replication adjudged good

(1) *Com. Dig.*, *Debt*, A, 2.

MARIA OTIS *versus* HENRY WARREN.

Non-tenure may be pleaded in bar; but if pleaded in abatement, the plea must be filed before the empanelling of the jury at the return term.

A plea in dower, that the tenant cannot render, &c., and concluding with praying judgment of the writ, that it may be quashed, is a plea in abatement.

THIS was a writ of *dower;* to which the tenant had pleaded in the Circuit Court of Common Pleas, with the usual reservation; and the action was brought into this Court by appeal, at the last October term in *Barnstable.* The tenant, according to the right reserved to him. waived his plea, and pleaded that he could not render the dower demanded, because he was not tenant of the freehold, &c., and never claimed any thing therein,
* and concluded by praying judgment of the writ, and [* 240]
that the same might be quashed. To this plea there
was a special demurrer, assigning for cause that the plea was not made and filed in the Circuit Court of Common Pleas, where the action was commenced, &c. The tenant joined the demurrer

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Whitman, for the tenant, contended that this was substantially a plea in bar; and that non-tenure might be pleaded in bar or in abatement, because it wholly defeats the demandant's action. (1)

Davis, (*Solicitor-General*,) for the demandant, said that this was manifestly a plea in abatement, and was pleaded too late; and if in bar it was bad, because non-tenure could not be pleaded but in abatement; and he relied on the case of *Keith* vs. *Swan*. (2)

JACKSON, J., delivered the opinion of the Court. This is unquestionably a plea in abatement. If this matter might be pleaded in bar, yet it may also be pleaded to the writ; and therefore the rule laid down by Lord *Holt*, in 1 Lord *Raym.* 593, cited in *Bac. Abr.* title *Abatement*, P, would not apply. And, besides, the plea neither begins nor concludes in bar; for, although the expression in the beginning, "that he cannot render," &c., is not in the form of any other plea in abatement, neither is it appropriate to a plea in bar.

As to the question whether it might have been pleaded in bar, this Court having decided, in the case of *Prescott* vs. *Hutchinson*, that a disclaimer may be so pleaded, it seems to follow that non-tenure may be pleaded in like manner. In the case of *Keith* vs. *Swan*, this point does not seem to have been much considered; as there was another ground suggested for that judgment, and the Court adopted the rule of the ancient common law as to the form of the plea of non-tenure. But in modern times many grounds of defence, which were formerly pleaded to the writ, and which show that the action is misconceived, or that the defendant is not liable to it in any shape, are considered as applying to the action itself, and may be taken advantage of accordingly.

This liberality in applying the rules of pleading is
[*241] peculiarly * necessary in real actions, in which many matters that may be material to the just defence of the tenant were in ancient times pleaded to the writ or to the action of the writ; and if all these must now be pleaded in abatement, and the pleas filed, according to our statute, on the first day of entering the actions in the Court of Common Pleas, the tenant may often be concluded, when he has a sufficient defence, for want of time to investigate and to state it properly. *Williams*, in his notes on *Saunders*, (3) justly remarks that the plea of non-tenure, although it prays judgment of the writ, is not strictly in abatement; for, instead of giving the demandant a better writ, it shows that the tenant is not liable to the action in any shape. The replication,

(1) *Bac. Abr.*, *Abatement*, N. and P. — 12 *Mass. Rep.* 485, *Parker* vs. *Murphy*. — 13 *Mass Rep.* 439, *Prescott* vs. *Hutchinson*.
(2) 11 *Mass. Rep.* 216.
(3) 2 *Saund.* 44, note 4.

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traversing this plea, is the same with a replication to a disclaimer, as provided by our statute of 1795, c. 75. This shows that the two pleas are substantially the same.

In the case before us, the demandant might have objected to the filing of this plea in abatement; but as she has demurred, there must be

Respondeas ouster awarded.

SARAH HOWARD *versus* EDWARD MITCHELL.

If, in the course of pleadings, the party who relies on matter of estoppel has no opportunity to plead it, he may show it in evidence; but when the matter to which the estoppel applies is distinctly averred or denied by one party, and the other takes issue on the fact, instead of pleading the estoppel, he waives the estoppel, and the jury are at liberty to find the truth.

THIS was an action of trespass for breaking and entering the plaintiff's close, and holding her out of the possession thereof from January 1, 1811, until October 23, 1815. The defendant pleaded in abatement, that one *Hannah James* was co-tenant with the plaintiff of the *locus in quo*, and that she, the plaintiff, has no title therein, except as tenant in common with the said *Hannah*, on which issue was joined.

At the trial of this issue, before *Wilde*, J., at the last October term in *Plymouth*, the defendant offered evidence
* to prove, and did prove, to the satisfaction of the jury, [* 242]
that the said *Hannah* was co-tenant with the plaintiff,
as alleged in the plea.

But the plaintiff objected to the admission of this evidence, on the ground that the defendant was by law estopped to prove that the said *Hannah* was tenant in common with the plaintiff, as the plaintiff had before sued the said *Mitchell* in a writ of entry for the same land described in her present writ, in which she claimed the same as sole proprietor thereof, and recovered judgment accordingly; a copy of which judgment was ready to be produced.

But the judge overruled the objection, and the jury returned a verdict for the defendant. If, in the opinion of the Court, this evidence ought not to have been received, the verdict was to be set aside, and a new trial granted; otherwise, judgment was to be rendered on the verdict.

Tillinghast and *Baylies*, for the plaintiff, contended that the

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former judgment, which was between the same parties, and on the title to the same land, was conclusive on the defendant as to this action, which was brought for the mesne profits. (1)

The plea was inadmissible; and it is immaterial what replication the plaintiff makes, since the plea itself ought never to have been received. (2)

Whitman, for the defendant. If the plaintiff relied on the former judgment as an estoppel, she should have so pleaded it. But it can have no such effect. The writ of entry was dated in November, 1813. The judgment only proves that on that day she was owner of the land. She now claims as owner from January, 1811, and would rely on that judgment, as conclusive in favor of her title from the day last mentioned, which is plainly absurd. (3)

Per Curiam. The writ on which the former judgment was founded was tested in 1813; of course, the judgment could not conclude the defendant for any time prior to that date. So neither could it conclude him for any time subsequent to the
[* 243] recovery; as the plaintiff *might have aliened the premises, or part of them, after that time.

But it is not necessary to consider whether this judgment might have estopped the defendant at all, or for what part of the time laid in the present declaration; because it is very clear that it cannot so operate, as these pleadings stand. The plaintiff should have replied it specially, and relied on the estoppel.

When, in the course of the pleadings, the party who relies on matter of estoppel has no opportunity to plead it, he may show it in evidence; and it will in general have the same effect as if pleaded. But when the matter to which the estoppel applies is distinctly averred or denied by one party, and the other, instead of pleading the estoppel, as he may in that case, takes issue on the fact, he waives the estoppel, and the jury are at liberty to find the truth.

This principle is recognized in *Hobart*, 207, and in the case of *Trevison* vs. *Lawrence & Al.*, reported in 1 *Salk.* 276, and in several other books, (4) and has been uniformly considered as the settled law on this subject. (5) (*a*)

Judgment according to the verdict.

(1) 2 *Burr*, 665, *Aslin* vs. *Parkin*. — 7 *D. & E.* 112, *Denn* vs. *White & Ux.* — 3 *Black. Comm.* 205. — 2 *Peake's Evidence*, 326.
(2) *Vin. Abr., Mesne Profits*, K.
(3) *Bull. N. P.* 87, *Decosta* vs. *Atkins*.
(4) 2 Lord *Raym.* 1051. — 6 *Mod.* 256. — *Holt's Rep.* 228.
(5) 1 *Chitty on Pleading*, 575, 617 — 1 *Saund.* 325, note 4.
(*a*) [*Vooght* vs. *Winch*, 2 *B. & A.* 662. — *Doe* vs. *Huddart*, 2 *Cr. M. & R.* 322. — *Hooper* vs. *Hooper*, *M'Clel. & Y.* 509. — *Jones* vs. *Reynolds*, 7 *Cor. & P.* 335. — *Doe*

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vs. *Harvey*, 8 *Bing* 242. — *Adams* vs. *Burnes*, 17 *Mass. Rep.* 365. — *Phil. & Am. Ev.* 510—512. — *Greenl. Ev.* 567, 568, 569, and cases there cited. — *Eastman* vs. *Cooper*, *Pick.* — "It appears inconsistent," says Mr. *Phillips*, "that the principle of the authority of a *res judicata* should govern the decision of a *court* when the matter is referred to them by pleading the estoppel, but that a jury should be at liberty to disregard this principle altogether, and that the operation of such an important principle as that of the *res judicata* should depend on the technical forms of pleading in particular actions." — *Ph. & A.*, ubi sup. — See cases cited in note to 5th *Am.* ed *Chitty on Contracts*, 788. — ED.]

THE INHABITANTS OF NANTUCKET, Complainants, *versus* JOSIAH COTTON.

No appeal lies from an order of the Court of Common Pleas, for assessing the relatives of a pauper for his support, pursuant to the statute of 1793, c. 59, § 3.

THIS was a complaint of the inhabitants of *Nantucket*, under the provision of the statute of 1793, c. 59, § 3, to the Court of Common Pleas for the county of *Plymouth*, praying the said court to assess upon the respondent a reasonable sum for the support of his son, who had become chargeable to the town of *Nantucket*. That court, after hearing the parties, assessed a certain sum; and the respondent, conceiving that his ability had been overrated by the court, and finding himself aggrieved thereby, appealed to this Court from the order of the Common Pleas.

* *Thomas*, for the respondent, prayed the Court to hear [* 244] the parties, and their evidence, with a view to have the said assessment reduced.

Baylies, for the complainants, contended that no appeal was provided in the case; and, in support of this position, he cited and relied upon the cases of *Lowell* vs. *Spring*, (1) and *Smith & Al.* vs. *Hubbard*. (2)

Per Curiam. The jurisdiction given to the Common Pleas by the statute, under which this process was instituted, is very special. It is plain that the legislature intended to confine the proceedings to that court, and that its orders on the subject should be final. This is a very convenient arrangement; and we see no constitutional objection to it. The appeal is dismissed.

(1) 6 *Mass. Rep.* 398. (2) 11 *Mass. Rep* 24.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF BERKSHIRE, SEPTEMBER TERM, 1817, AT LENOX.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES.
HON. CHARLES JACKSON, }

WILLIAM BRIDGE *versus* AZARIAH EGGLESTON.

Jurors are not to be permitted to testify to the motives or inducements upon which they have joined in a verdict.

The conduct and declarations of a grantor, respecting the estate conveyed, and tending to prove a fraudulent intention on his part before the conveyance, is proper evidence for the jury, upon an inquiry into the validity of such conveyance by a creditor or subsequent purchaser, who alleges it to be fraudulent.

THIS was a writ of entry, in which the demandant counted upon his own seisin of the estate demanded within thirty years, and upon a disseisin by the tenant.

Trial was had upon the general issue before *Putnam*, J., April term, 1816. The demandant claimed under an execution, which he levied upon the demanded premises, as the property of *Joseph Goodwin*, on the 15th of November, 1811, in due form of law. The tenant claimed to hold the premises under a deed of conveyance

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from the same *Goodwin*, dated the 6th of October, 1809, acknowledged and recorded.

The demandant undertook to prove that the said deed was made without a good and valuable consideration, and was not *bonâ fide*, but made to delay or defeat the creditors of the said *Goodwin*.

* It was admitted that the demandant, on the 6th of [*246] October, 1809, and long before, was a creditor of said *Goodwin*; his claim originating in consequence of the liability of *Goodwin* and other directors of the *Berkshire* Bank, in their individual capacity. The demandant proved that the said bank stopped payment in August, 1809; and he was permitted to give in evidence the confessions of *Goodwin*, made when *Eggleston* was not present, prior to the said 6th of October, provided the knowledge thereof was brought home to *Eggleston* before that time; the tenant objecting to the admission of such evidence.

One witness testified that, in the spring of 1809, *Goodwin* told him that the bank would fail; that there was not much property belonging to the directors; that he had an idea of their individual liability, and that was the worst of all; that it would be a question with him, whether he should give up all his property and pay as much as he could, or save what he could to live on and pay as little as he could; that he seemed to think it would be best to pay as little as he could; that it would be a question whether he should go to jail here in *Albany*, or in some other place.

Another witness testified that, in August, 1809, he conversed with *Eggleston*, who told the witness that the directors could not pay twenty-five cents on a dollar. A third witness swore that, in August, 1809, *Eggleston* said to the witness, that the failure of the directors would be the consequence of the failure of the bank; adding, that it would take every cent they had. A fourth witness testified that he was present at a conversation between *Goodwin* and *Eggleston* in August, 1809, when *Goodwin* observed that the notes of the bank were not worth a cent on a dollar, nor were the directors worth a cent. It was in evidence that *Eggleston* was present at a meeting of the directors of the bank on the 4th of October, 1809, and that he observed that the directors had long faces.

There was evidence that *Eggleston* gave two promissory notes, dated on the same day with the deed, * for [*247] 5000 dollars each, payable respectively in three and six years, as a consideration for the land conveyed to him by *Goodwin*; and that one of these notes had been sued by *Robert Center*, an endorsee, and that the judgment recovered thereon was satisfied by an extent on *Eggleston's* real estate.

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The judge instructed the jury that a deed made to delay or defraud creditors was void against them, unless made for a good and valuable consideration, and *bonâ fide* to a purchaser, without notice of the fraud; that the confessions of *Goodwin*, after the date of his deed to *Eggleston*, were not to prejudice this latter; nor the confessions before, unless the knowledge of the fact were brought home to *Eggleston* before the date of the deed; that negotiable notes were to be considered as payment, if delivered and accepted according to their import; that, if they believed that *Eggleston* bought the estate innocently, he should be protected, although the grantor was endeavoring to place his property in a situation to keep it from his creditors; because a man in failing circumstances might lawfully sell his estate with a view to pay his debts; but that, if *Eggleston* paid the money for the estate, and did it with a knowledge of the circumstances of the grantor, and with the intent to aid and assist him to delay or defraud his creditors, the deed would be void against them.

The jury returned a verdict for the demandant; and the tenant moved for a new trial, on the ground that evidence of the confessions of *Goodwin*, admitted as aforesaid, ought to have been rejected; and if that should be the opinion of the Court, a new trial was to be granted.

Ashmun, for the tenant, before entering on the general ground of the motion for a new trial, offered the affidavit of *John Hewlet*, who was foreman of the jury who tried the cause, stating that he, with three of his brethren, were opposed to the verdict, but that, believing it to be their duty to yield their opinion to that of the majority, they had joined in returning the verdict [*248] * for the tenant. *Ashmun* was aware that testimony of this kind had been rejected in some courts, but he was ignorant that such a decision had occurred in this Court. It was admitted in the case of *Grinnell* vs. *Phillips*, (1) although the late authorities are on the other side. (2)

But the Court said that it had been expressly ruled, in a capital case in *Suffolk*, that jurors should not be received to testify to the motives or inducements upon which they had joined in a verdict. And as to the conduct of the jurors in the present case, as stated in the affidavit, *the Chief Justice* expressed himself satisfied with it. (*a*)

Ashmun then urged objections to the admission of *Goodwin's*

(1) 1 *Mass. Rep.* 530.

(2) See 4 *Binney's Rep.* 150, *Cluggage* vs. *Swan.* — 1 *New Rep.* 326, *Owen & Al.* vs *Warburton.*

(*a*) [3 *Chitty, Pr.* 920, 921, *Eng.* ed. — *Homer* vs. *Watson*, 6 *Car. & P* 680. — *Desbrow* vs. *Wetherly*, 6 *Car. & P.* 760, 761. — *Tidd. Pr.* 869—896. — ED.]

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conversations and confessions, before making his deed, and not in the presence or hearing of *Eggleston*. He was a competent witness for either party at the trial. (3)

Evidence should be legally sufficient at the time of its admission; and it is not enough after the jury have heard it, and its impression has been received upon their minds, that the judge afterwards endeavors to counteract its effects. The evidence in this case was objected to, and should not have been admitted thus conditionally, nor until, by previous testimony, the facts necessary to make it proper evidence had been proved.

The instructions of the judge to the jury were unquestionably correct; but perhaps no instructions would have sufficed to remove from their minds the impressions which had been made by the improper testimony they had heard.

Gold and *Sedgwick* for the demandant.

PARKER, C. J. The evidence objected to at the trial, and now made the ground of a motion for a new trial, is that which relates to certain conversations and declarations of *Goodwin*, the grantor of *Eggleston*, and the judgment debtor, in the judgment which was attempted to be satisfied by a levy on the land demanded in this action.

*The substance of the conversation proved is, that [*249] *Goodwin* expected to be ruined by being connected with the *Berkshire* Bank as a director; and that he thought it best to pay as little of his debts as possible, and intimated an intention to submit to imprisonment in *Albany*, in the state of *New York*. This conversation took place before the execution of the deed to *Eggleston*, and he was not present at it. The judge overruled the objection made at the trial, on the ground that, if knowledge of the fact could be proved upon *Eggleston*, the evidence was proper; and there was afterwards evidence of other declarations of *Goodwin*, made in the presence of *Eggleston*, of a similar import, so far as their tendency was to prove the known or expected insolvency of *Goodwin*, but none in which any intention, on his part, to conceal his property was intimated.

So far as the conversation tended to prove the insolvency or embarrassment of *Goodwin* before he conveyed his estate, we think the evidence proper. (*a*) The fact was essential to be proved, in order to establish a motive on his part to make a fraudulent conveyance; and it could not be better proved than by his own

(3) 11 *Mass. Rep.* 498, *Loker* vs. *Haynes*. — *Ibid.* 368, *Inhabitants of Worcester* vs. *Eaton*. — 12 *Mass. Rep.* 439, *Clarke* vs. *Waite*.

(*a*) [*Bell* vs. *Coiel*, 2 *Hill, Ch.* 109. — *Varick* vs. *Briggs*, 6 *Paige*, 323. — *Lee* vs *Huntown*, 1 *Hoff.* 448. — *Fitch* vs. *Chapman*, 10 *Conn.* 8. — ED.]

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acknowledgment. It is true that *Goodwin* is a competent witness, if he is not bound by his covenants, or if he is released. But the creditor, who is pursuing his debt through a supposed fraudulent conveyance, is not obliged to rely upon the testimony of the principal in the supposed fraud. His conduct, actions, and declarations, before such conveyance is made, are proper subjects to lay before the jury, to enable them to ascertain whether the conveyance, on his part, was fraudulent; and such evidence does not prejudice the supposed grantee. If he purchased *bonâ fide*, and for a valuable consideration, without knowledge of such design, his title will not be affected.

There has been much doubt with respect to this species of evidence, different opinions having heretofore prevailed, and no case solemnly decided having settled all the questions which [*250] grow out of the subject. It is *certain that more laxity or liberality has prevailed, with respect to the rules of evidence in inquiries concerning the validity of conveyances supposed to be fraudulent, than upon most other subjects. It will be well to establish some precise rules, which may make this branch of litigation less troublesome than it has hitherto been. Now, as the creditor, in such cases, is obliged to prove actual fraud in the grantor, and a participation in or knowledge of it in the grantee, we think these two branches of his case will admit of the application of evidence to the two parties which, although apparently inconsistent with, is by no means repugnant to, the common rules of evidence.

To prove fraud in the grantor, his conduct and his declarations before the conveyance may be the best, and often the only, evidence within the power of the creditor. He at that time is not interested, nor can it be his design, to injure those with whom he may afterwards contract. If fraud is thus proved upon him, then the knowledge of it on the part of the grantee is to be proved; which may be done by showing a trifling consideration, or none at all; by acts inconsistent with the *bonâ fide* ownership of the property; by confessions of the nature of his bargain; or by other circumstances, tending to show a knowledge of the designs of the grantor. Without this latter evidence, the former, as to the designs of the grantor, is wholly ineffectual to defeat the purchase; and a jury, under the direction of the court, will always be able to discriminate; so that the purchaser will not be injured by the declarations of the grantor, unless he be proved to have been privy to his fraudulent designs.

But the declarations, conversations, or even the actions, of a grantor, *after* making his deed, ought not to be received in evidence, in prejudice of the title he has created; because he is

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interested to have such title defeated by his creditors; and because the other party has a right to examine him upon oath, provided he is a competent witness. Before he has conveyed, he is
* an independent party, whose conduct may be exam- [* 251]
ined, to ascertain the causes and motives of his conveyance. Afterwards he has no relation to the estate he has conveyed; and his conversation respecting it, if sworn to on a trial, is mere hearsay, which is never received as evidence.

Two cases have been adjudged, which tend to establish this latter principle. The first is that of *Bartlett* vs. *Delprat & Al.* (4) There the declarations admitted were of a deceased supposed grantor, *viz.*, that he had never made any conveyance to his son. The judge at the trial admitted evidence of that declaration; but a new trial was granted, and the principal reason assigned was, that no cure could be found, where the declarations of a party, so situated in point of interest, had been received as evidence. The declarations objected to in that case were made after a title was supposed to be created by deed, and tended to contradict and defeat that deed. The other case is that of *Clarke* vs. *Waite*, cited in the argument. There declarations of the grantor, both before and after the execution of the deed, tending to show that it was fraudulent, were rejected by the judge at the trial, and his decision was confirmed by the whole court.

This decision does not establish the inadmissibility of declarations made before the deed, if connected with evidence of knowledge on the part of the grantee. The adjudication is not to be extended beyond the subject matter, which was a case of declarations made after the execution of the conveyance, as well as before, without any proffer of evidence tending to show a participation in the fraud by the grantee.

There is nothing, therefore, in any settled decisions to interfere with our opinion in the present case; which is, that the conduct and declarations of the grantor, respecting the estate conveyed, and tending to prove a fraudulent intention on his part before the conveyance, is proper evidence for the jury upon an in-
quiry into * the validity of such conveyance, by a cred- [* 252]
itor or subsequent purchaser, who alleges it to be fraudulent (a)

Judgment on the verdict.

(4) 4 *Mass. Rep.* 702.

(a) [*Phœnix* vs. *Ingraham*, 5 *Johns.* 412. — *Ivatt* vs. *Finch*, 1 *Taunt.* 141. — *Davis & Al.* vs. *Spooner*, 3 *Pick.* 284. — *Woolway* vs. *Rowe*, 1 *Ad. & E.* 114. — *Spargs* vs. *Brown*, 9 *B. & Cr.* 935. — *Phil. & Am. Ev.* 8th *Lond.* ed. 315, 392, 416, 417, 448. — *Greenl. Ev.* 213, 214. The declarations of a person living at the time of the trial are

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not in general admissible to affect the title of a party to the suit, unless they be a part of the *res gesta*, or there be a privity of estate, or identity of interest between the person making them and the party against whom they are offered in evidence. — ED.]

ANDREW PHELPS, Plaintiff in Error, *versus* TITUS GOODMAN.

It is not erroneous for the Court of Common Pleas to enter judgment upon the report of referees, for a less sum than that awarded by them; the party in whose favor the award is made releasing the amount of the difference between the two sums.

THIS was a writ of error, brought to reverse a judgment of the Circuit Court of Common Pleas for this county, rendered upon the report of referees, appointed by the parties by a rule entered into before a justice of the peace, pursuant to the statute of 1786, c. 21.

It appeared, from the record brought up, that the report had been once made to the court, and recommitted to the same referees; and being again made at a subsequent term, was accepted by the court. And the court further ordered that the sum of 66 dollars 20 cents should be deducted from the amount found by the referees to be due from *Phelps* to *Goodman*, which sum *Goodman* released upon the record, and judgment was entered for the remainder of the sum awarded by the referees, with costs.

The errors assigned related to the said interference by the court, in reducing the sum reported in favor of the defendant in error, and suggested the want of jurisdiction in the court to do any thing more than recommit the report. And *Gold* argued that the judgment, not having pursued the report, which was its only foundation, was erroneous, and could not be supported.

By the Court. The principal error assigned by the plaintiff in error is, that the judgment does not comport with the report of the referees, being rendered for a less sum than was awarded by them.

By the record it appears that the report was accepted in the whole, and that judgment was rendered for a less sum than that which was awarded; the defendant in error, in whose favor the sum was reported, having released the difference upon the record.

[* 253] * There is no error in this, any more than there would be in a judgment at common law for a less sum than was returned in the verdict, the plaintiff having remitted the difference.

It would seem, by the language used by the counsel in the

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assignment of errors, that they objected to the report because of this among other mistakes committed by the referees; and that the court undertook to determine the amount of the mistakes, and finally ascertained what was due. If this appeared, it would be fatal; because the referees are to judge, and not the court, of the controversy between the parties. But this does not appear of record, but only in the statement of counsel. Nothing more appears to us than that the court gave judgment for a less sum than the referees awarded; and this they might well do, if the prevailing party chose to relinquish the difference.

If the court proceeded in the manner suggested by the plaintiff in error, in his assignment, his objections should have been specified and introduced into the record. As the matter now stands, there is no cause for reversing the judgment.

Judgment affirmed.

THE INHABITANTS OF GREAT BARRINGTON *versus* THE INHABITANTS OF LANCASTER.

A pauper had a derivative settlement in a part of the town of A, which was annexed to the town of B; but being of age, and out of the commonwealth at the time of such annexation, his settlement continued in A. Afterwards the town of C was incorporated, and contained within its limits the tract of land in right of which the settlement was held. In the act incorporating C. it was provided that persons who had gained a settlement in the part of B which by the act was made a part of C, and who should thereafter need support, should be supported by C. This latter town was holden liable for the support of the pauper, although never, in fact, settled in B.

ASSUMPSIT for expenses incurred in the relief and support of *John Bixby*, a pauper, whose legal settlement the plaintiffs aver to be in *Lancaster*.

* At the trial of the cause, which was had upon the [* 254] general issue before *Jackson*, J., at the last May term in this county, the only question made in the case was, whether the said *Bixby* had his settlement in *Lancaster*, as the plaintiffs allege; and the following facts were in evidence: —

The pauper was born in 1747, at *Lancaster*, where his father was then settled; and he had never acquired a new settlement within the commonwealth.

Whilst the father was still living, *viz.*, in February, 1781, that

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part of the town of *Lancaster* in which he resided was taken off and annexed to the town of *Shrewsbury*.

In March, 1786, a part of *Shrewsbury*, including that part in which the pauper's father had resided, was erected into a separate town, by the name of *Boylston*.

In January, 1808, the town of *West Boylston* was incorporated, including a part of the towns of *Boylston*, *Sterling*, and *Holden*; and that part of *Boylston* which was included in *West Boylston* is the same in which the pauper's father had resided as aforesaid.

In the two first-mentioned acts, there is no special provision respecting paupers; but in the act for incorporating *West Boylston*, (1) it is enacted, "that any person who may have gained an inhabitancy at any time before the first Monday of March [then] next within that part of either of the said towns which is by this act incorporated into the town of *West Boylston*, and who shall hereafter need to be supported as a poor person, shall be supported by the town of *West Boylston*."

Upon these facts the judge directed a verdict for the defendants, which was returned accordingly; and the plaintiffs moved for a new trial, on account of the said direction.

Whiting, for the plaintiffs. It is very clear that this [*255] *pauper has his settlement in *Lancaster*, unless it has been transferred to *West Boylston* by the act incorporating the latter town. The father's settlement in *Lancaster* was not transferred to *Shrewsbury* by the annexation of his land to the latter in 1781; as, before the statute of 1793, c. 34, the division of a town or the annexation of a part of one to another did not change the settlement of the inhabitants.

It cannot be inferred, from the act incorporating *West Boylston*, that the pauper's settlement was transferred to that town. The provision in that act extended only to the three towns named in it, and of parts of which the new town was to consist. It extends to persons who had gained a settlement in one of *the said towns*. *Lancaster* is not named in the act, and was no party to the convention which the statute was intended to ratify. The pauper had never had a settlement in either of the three towns. His father had died long before the incorporation of *West Boylston*, and the settlement of the son being merely derivative from his father, his case was not within the expression of the statute, which refers only to those who might have gained a settlement in their own right by inhabitancy. The construction contended for by the defendants would operate with great hardship upon *West Boylston*.

(1) *Stat.* 1807, c. 48

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Ashmun, for the defendants, contended that the settlement of the pauper's father was transferred, in 1781, from *Lancaster* to *Shrewsbury*; which he argued to be the natural and necessary effect of the act of annexation, since it contained no provision to the contrary. The act of 1808, incorporating *West Boylston*, is so clear in its provision on this subject as to put it beyond a doubt that this pauper is chargeable to that town. The supposed hardship arising in cases of this kind has often been urged, and as often disregarded by this Court. Such suggestions can have no operation, when opposed to the will of the legislature; by a close adherence to which, upon questions relating to the settlement of paupers, all the hardships will probably in the course of time be equalized.

* PARKER, C. J. The pauper's original settlement [*256] was in *Lancaster*, that being his father's settlement at the time of his birth. On the annexation of that part of *Lancaster* where the father dwelt to *Shrewsbury*, *his* settlement was transferred to the latter town; for although no express provision respecting paupers appears in the act providing for their annexation, yet it is a necessary effect of such annexation, that the town which acquires the new inhabitants and new territory should also incur such burdens as may be incident to the new relations.

It does not appear, however, that the pauper was, in 1781, when the annexation took place, a member of his father's family. On the contrary, it was stated at the bar, and not denied, that, before that time he had removed without the commonwealth; and as he came of age long before that period, it is to be presumed that he was emancipated, and capable of gaining a settlement for himself; so that his settlement was not transferred with his father's; nor did the annexation operate upon him personally to change his settlement, on account of his absence, as was settled in the case of *Windham* vs. *Portland*. (2)

The pauper's settlement therefore remained in *Lancaster*, but for the provisions in the statute incorporating *West Boylston*. By that act the part of *Lancaster* in which the pauper's father had resided, and which afterwards became a part of *Shrewsbury*, was constituted, with parts of other towns, the town of *West Boylston*.

It has been contended that, to bring a pauper within the provision of this statute, he should literally have *gained* a settlement in one of the towns out of which *West Boylston* was created; and so that this pauper, never having had a settlement in any town but *Lancaster*, which is not one of the component parts, cannot be charged to *West Boylston*, but belongs still to *Lancaster*.

(2) 4 *Mass. Rep.* 384

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The obvious meaning, however, of the legislature was to make *West Boylston* liable, in respect to the territory of which it had acquired the municipal jurisdiction; in order that, as it [* 257] acquired by its incorporation * all the rights and privileges, which the several towns that were dismembered had enjoyed, it should also succeed to all the duties and burdens to which they had before been liable, according to the reasonable maxim, *Qui sentit commodum, sentire debet et onus.* *Lancaster* therefore, which had, ever since the year 1781, lost the privilege of taxing the lands and property of the inhabitants of that part of its former territory which had successively been transferred to *Shrewsbury*, *Boylston*, and *West Boylston*, is discharged from the burden of supporting any of those inhabitants, or others who derive a settlement under them. (*a*)

Judgment on the verdict

(*a*) [*Fitzburgh* vs. *Westminster*, 1 *Pick.* 144. — *Southbridge* vs. *Charlton*, 15 *Mass. Rep.* 248. — *Hallowell* vs. *Bowdoinham*, 1 *Gr.* 129. — *Lancaster* vs. *Sutton*, 16 *Mass. Rep.* 112. — *Westborough* vs. *Franklin*, 15 *Mass. Rep.* 254. — *Princeton* vs. *Boylston*, 15 *Mass. Rep.* 257. — ED.]

THE INHABITANTS OF STOCKBRIDGE, Plaintiffs in Review, *versus* THE INHABITANTS OF WEST STOCKBRIDGE.

A deed more than thirty years old may be given in evidence, without proof of its execution, when found in possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance.

The conveyance of a slave by the deed of an agent, authorized in writing only by the owner, was held sufficient to transfer the property in the slave.

And a slave so conveyed was held to have been the slave of the purchaser, notwithstanding his determination and promise not to hold him more than ten years.

THIS action, the decision of which upon certain agreed facts has already been reported, (vide ante, vol. xii. p. 400,) came on again for trial upon a review granted by the Court, upon the petition of the inhabitants of *Stockbridge*, who were original plaintiffs, (vide ante, vol. xiii. p. 302,) before *Jackson*, J., at the last April term in this county.

The action was brought to recover the money expended by the plaintiffs for the support of *Frank Duncan*, a negro man, whose settlement they allege to be in *West Stockbridge*. The only question made at the last trial was, whether the said *Duncan* was formerly

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the slave of *Elijah Williams*, Esq., late of *West Stockbridge*, so as to have gained a settlement from the said *Williams*, as his master.

The said *Williams*, who was deceased before the trial, had given his deposition, which was taken for the original action, and was again used on the trial by review. *He therein [*258] states that, in the year 1770, the said *Duncan* being a slave in *New Jersey*, he, the said *Williams*, bought the time or services of the said slave for the term of ten years, and paid therefor the sum of £100; that he was from principle averse to holding a slave, but was willing to purchase his services as aforesaid, if the negro consented to it; that he supposed there was a deed or writing between him and the former owner, but had no particular recollection about it. It did not appear that he considered himself bound to restore the slave to his former master at the end of the ten years.

The said *Williams* died in June, 1815; and in the following October, his son, looking over a large quantity of his father's old papers, accidentally found an instrument purporting to be a bill of sale from one *William Bott*, of *New Jersey*, to the said *E. Williams*, of a negro slave, called *Frank*. The instrument, a copy of which came up in the case, bears date on the 2d of April, 1770; the consideration expressed in it is £100; and it purports to convey absolutely the whole title and interest in the said slave for his life.

The plaintiffs offered this paper in evidence at the trial. The defendants objected to its going to the jury; but the judge admitted it, leaving it to the jury to be considered in connection with the said deposition, if they should believe it to relate to the purchase mentioned in the deposition.

It appeared that the said bill of sale was in the hand-writing of the said *Williams*; that the owner of the said slave was one *Joseph Firman*, of *New York*, of whom the said *Bott* had hired him; that *Firman*, at the request of the slave, had written a letter to *Bott*, requesting him to sell the slave, or to find another master for him; that *Williams* came there to procure a man to work at his furnace in *Stockbridge*, and, upon *Bott's* recommendation, *Frank* consented to go with him, he agreeing with *Frank* that, if he would serve him faithfully for ten years, he would then give him his time, and would also give him a yoke of steers and ten acres of land; *saying that he did not keep slaves any longer than till [*259] they had earned what he paid for them. *Williams* then paid *Bott* £100, and *Bott* undertook to sell and convey the slave to him. The said *Frank* returned with *Williams* to *Stockbridge*, and continued in his service seven years, and paid him £30 for the other three years of the ten years before mentioned; which sum he

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paid out of his wages and bounty given him as a soldier in the army of the *United States*.

The defendants objected to the admission of the said bill of sale in evidence, because its execution was not proved by the subscribing witnesses; and also because it did not appear that *Bott* had any right or authority to sell and convey the slave in this manner. Both these objections were overruled.

Upon the foregoing facts the judge instructed the jury that, by the purchase and conveyance made as above mentioned, the said *Frank* became the slave of the said *Williams*; and that his intention or his agreement above mentioned, to give him his time at the end of ten years, upon the condition of his good behavior for that time, would make no difference in the case.

A verdict being returned for the plaintiffs, the defendants moved for a new trial, on account of the admission of said evidence, and of the said direction given to the jury.

Whiting and *Howe*, for the defendants. The bill of sale, its execution not being proved by the subscribing witnesses, was improperly admitted in evidence. Its being more than thirty years old is not sufficient of itself, unless it had been found among the papers of the party claiming under it, and unless possession of the article sold had followed its execution. By papers in this rule of the law must be understood the valuable papers of the party, such as he would naturally keep in his desk or other place of security. But this paper was found in the garret, amidst old papers, which had been thrown away as of no value. The possession, too, should pursue the conveyance. Here *Williams* originally refused [*260] to take *Frank* as a slave, and entered * into a contract with him, incompatible with such a relation, and finally dismissed him from his service, receiving from him a compensation for the remaining term of his service; and this compensation *Frank* had himself received in the character of a citizen soldier. (1)

Bott was not the owner of the slave, and he had no sufficient authority from *Firman* to make a bill of sale. Indeed, there is no evidence of any authority. If he had been fully authorized to make such a bill of sale, he should have pursued his authority, and made it in the name of the principal. (2) But here was, in fact, no sale. To a contract of this species, as to every other contract, the consent of two minds is necessary. *Williams* would not consent to purchase or to hold a slave. His declarations at the time, as well as his after

(1) 2 *D. & E.* 466, *Rex* vs. *The Inhabitants of Farringdon.*—1 *Esp. Rep.* 275, *The Governor, &c., of Chelsea Waterworks* vs. *Cowper.*—3 *Johns.* 292, *Jackson* vs. *Blanshan.*

(2) 7 *Mass. Rep.* 14, *Fowler* vs. *Shearer.*

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conduct, prove this. And if the Court should consider, as far as *Williams* was himself concerned in the decision, that he should be bound by his acceptance of the bill of sale, according to the terms of it, yet it would be carrying the principle to a great extent to make it binding on third persons and strangers to the transaction, as in this case.

Ashmun, for the plaintiffs. The rule of law, that a deed more than thirty years old shall be received in evidence without proof of its execution, is so well established, that even when a subscribing witness to such a deed has been present in court, the court have refused to examine him, that the principle might not be brought into doubt. The bill of sale in this case was in the possession of the vendee nearly half a century, and was found in the place where it was most natural to expect to find it after so long a time, that is, among the old and useless papers of the party. (3)

The sale of a slave need not be by deed, any more than any other personal chattel; except that in some of the Southern States they are made real property by statute. But let the objections be of what force they may, the sale was good and sufficient, as to all the world but the parties to it, and they always acquiesced in it *Williams* did all in his power to secure his title, in taking * the conveyance with covenants of warranty. *Bott* [* **261**] was bound by these covenants; and *Firmin*, who had authorized *Bott* by his letter to make the sale, could not question it. *Williams's* intention to manumit the slave was not a manumission, nor could it have any operation on the contract. (4)

Per Curiam. When this cause was before us after the former trial, we decided, upon the testimony of Mr. *Williams*, which was all the evidence then in the case, that *Frank Duncan*, the pauper was not a slave. When the bill of sale, under which *Williams* held him, was found, we granted a new trial to the plaintiffs.

At this last trial, the defendants have objected to the admission of the bill of sale in evidence, because its execution was not proved by witnesses. But the instrument was more than forty years old, and, as an ancient deed, was properly submitted to the jury. It is an established rule of evidence, and often recognized, that a deed more than thirty years old may be given in evidence, without proof of its execution, when found in the possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance. (5) (*a*)

(3) *Phillips's Law of Evidence*, 349. — *Selwyn*, 492.
(4) 7 *Johns.* 330, *Kettletas* vs. *Fleet.* — 5 *Johns.* 365.
(5) *Bull. N. P.* 255.
(*a*) [*Doe* vs. *Burdett*, 4 *Ad. & E.* 19. — *Phil. & A.* 650—652. — ED.]

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The authority of *Bott* to execute the bill of sale has also been questioned. But a less formal authority was sufficient for the sale of a personal chattel, as a slave must be considered to be, than for the conveyence of real estate; and after more than thirty years' undisturbed possession even of real property, we should think it too late to question the authority of the agent who had undertaken to convey it. The property of a personal chattel may pass by delivery without deed, and even without writing. In this case, *Bott* had sufficient authority from *Firmin*, the owner, in a letter requesting *Bott* to sell the slave, or to find another master for him.

It has also been argued that the bill of sale, if its execution had been legally proved, had not the effect to convey the property in the slave. But it appears to have been a full and absolute
[*262] transfer of the slave for *his life. *Williams's* scruples, as to the right of holding a fellow-creature in bondage, made no difference in the character of his property; nor did his intentions to emancipate him, or his promise to that effect, or his final execution of that intent, in any wise affect the nature of his purchase. No contract made with the slave was binding on the master; for the slave could have maintained no action against him, had he failed to fulfil his promise, which was an undertaking merely voluntary on his part. While *Frank* continued in *Williams's* service he was to every intent his slave. He had a legal right to keep him in service for life; and in case of his sickness or inability to labor, his master must have supported him at his own expense.

Judgment on the verdict.

GAD HUMPHRY, Plaintiff in Error, *versus* THOMAS B. STRONG.

A demand annexed to a rule of reference under the statute of 1786, c. 21, is sufficiently made, if in the hand-writing of the party making it, as, "A B demands," &c., without being subscribed by him. And it is competent for the Court of Common Pleas to receive evidence that it is in the hand-writing of the party.

THIS writ of error was brought to reverse the judgment of the Circuit Court of Common Pleas for this county, rendered upon the report of referees appointed under the statute of 1786, c. 21.

The referees made their report to the Common Pleas, June term, 1817, awarding twenty-five dollars to the said *Strong*. The said

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Humphry objected to the acceptance of the report, because the demand annexed to the rule was not signed by *Strong*. The demand annexed to the rule was thus: — "*Thomas B. Strong* claims damages of Major *Gad Humphry*, two hundred dollars, for trespass committed by his dog in killing his sheep," &c.

The record of the Common Pleas states that, "after hearing the parties, it appearing to the court here that the demand annexed is in the hand-writing of the said *Thomas B. Strong*, it is ordered that the said report be accepted, and judgment entered accordingly. It is therefore considered," &c.

* The errors assigned, besides the general error, are, [* **263**] — 1. That the demand annexed to the rule of reference was not signed by the said *Strong*; and, 2. That the Court of Common Pleas undertook to try and determine this matter of fact, *viz.*, that the demand annexed was in the hand-writing of the said *Strong*.

Jarvis, for the plaintiff, observed that the provisions of the statute, on which the original proceedings in this case were founded, were in derogation of the common law, and should not be extended beyond the natural and common force and understanding of the expressions made use of by the legislature.

The statute requires that the person making the demand shall make out a particular statement thereof *under his hand*. Now, the common acceptation of this expression is a *subscription* of the person's name written by himself. This, too, is the construction which this Court have put upon the words, as used in this statute, in the case of *Mansfield in Error* vs. *Doughty*. (1)

The Court of Common Pleas had no authority to adjudicate on the matter of fact, whether the demand was in the hand-writing of the party making it. The referees could not amend the submission, and give themselves jurisdiction, before making their report; nor could the court alter the report after it was made. They could only see that the demand was not properly subscribed, and they were then bound to reject the report, as made without authority, and of course giving them no jurisdiction in the case.

Hubbard for the defendant in error.

Per Curiam. The demand annexed was in the hand-writing of the party claiming it, and the name was written by himself, although not subscribed to the demand. We think this a sufficient compliance with the statute, which does not require *subscribing*; and if it did, it would be too close a construction, to reject this demand, actually made out by the party himself, in his own hand-writing

(1) 3 *Mass. Rep.* 398.

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The case of *Mansfield* vs. *Doughty* is not like this; for
[*264] in that case it does not appear that *the party's name was used at all, or that the demand was in his hand-writing. For aught that appears, it might have been a mere copy of an account.

We think, also, that the Court of Common Pleas did right in receiving evidence that the demand annexed to the rule was in the hand-writing of the party making it. Had it been subscribed, it might have been necessary to prove the hand-writing; and if it would have been proper in that case, it was equally proper in this.

Judgment affirmed.

BARZILLAI PEASE *versus* WILLIAM H. FOLGER.

A person having a discharge under the insolvent laws of the state of *New York* was holden liable for money received by him for the use of another, after his petition and before the date of his certificate.

ASSUMPSIT for money had and received. The defendant pleaded a discharge under the insolvent laws of the state of *New York*, of which he was an inhabitant, as is the plaintiff also.

At a trial had before the chief justice it appeared that, on the 11th of January, 1812, the defendant petitioned the proper authority of the state of *New York* for the benefit of an act passed by the legislature thereof April 3, 1811, entitled "*An Act for the benefit of insolvent debtors and their creditors*," and a supplementary act passed on the 9th of the same April. On the 18th of the same January, he made an inventory of his debts, credits, &c., required by the act; and on the 24th of April following, he obtained his certificate of discharge.

On the 6th of February, 1812, he received the sum of 1000 dollars of an insurance company, for a debt owed by them to the plaintiff, who was then abroad, having left the defendant his agent and attorney. In his inventory there was no mention of the plaintiff as a creditor, nor was the said sum, so received for the use of the plaintiff, contained in the list of the petitioner's effects.

Gold and *Howe* for the plaintiff.

Ashmun and *Whiting* for the defendant.

PARKER, C. J. The question to be determined in
[*265] *this action is, whether the demand, which is the subject of it, is barred by the certificate of discharge which the

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defendant obtained under the insolvent law of the state of *New York*, passed the 3d of April, 1811, and the act supplementary to that act; both which have been produced in the case.

By the first act, the certificate is to be a discharge of all debts *due* at the time of the assignment, and contracted for before that time, although payable afterwards; and it is provided that, if the insolvent debtor be sued, he shall be acquitted of all debts *due at the time of the discharge*, or contracted for before and payable afterwards. Probably it was contemplated that the discharge would be given at the same time, or immediately after the assignment should be made; and the object of the legislature must be considered to have been to provide for the discharge of debts actually due, on which the time of payment had not arrived.

The provision of the supplementary act applies only to the case of debts becoming *due after the discharge*, on account of liabilities incurred at any time before, on certain undertakings expressed in the act. This latter provision is inserted in an act entitled, "An Act extending the time for the remission and commutation of certain quitrents, *and for other purposes*" — a title which would not directly indicate any provision for the relief of insolvent debtors.

Upon reflection, we are satisfied that the demand sued for in this action does not come within either of the acts above referred to; and perhaps we ought to suppose that the defendant did not originally intend to discharge himself of this demand under his certificate; for, if that had been his intention, common justice, and his duty as required by the act, demanded that he should have represented this as a debt before his effects were divided, that this creditor, whose debt, if it existed at all, was as much a debt of honor as any one could be, might have received some portion of those effects. But the defendant made no such representation, and justly, because, upon legal principles, he could not be considered * debtor, until a subsequent period, when he should be called to account for the money received by him for the plaintiff. [*266]

The money received by the defendant was received from an insurance company in *New York*, in February, 1812, by virtue of authority from the plaintiff. In receiving it, the defendant was merely agent of the plaintiff, he being absent at sea when the money became due. No demand appears to have been made upon the defendant until the commencement of this suit; so that he was not a debtor to the plaintiff until that time. For aught that appears, the defendant may have deposited this money for the plaintiff, or separated it from his own money and property, without converting

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it to his own use; and if such had been the case, it would not have been considered as part of his effects, to be distributed among his creditors.

In this view, the defendant acted honestly and fairly, in not considering himself a debtor to the plaintiff for money which he had received for him, and which he held as his; and his subsequent determination to avail himself of his certificate, to avoid the plaintiff's demand, cannot avail him. There was no debt due before the discharge, which could be affected by the principal act; nor was there any such liability as is provided for in the supplementary act; so that the certificate cannot operate in this action, and the plaintiff must have judgment.

ALFRED SEYMOUR *versus* CALEB BENNET.

Of rescinding contracts, and the rights of the parties consequent thereon.

[One who claims to rescind a contract for non-compliance of the other party, must have been ready and offered to perform his own part. An offer to settle and pay what balance shall be found due by one party, followed by a refusal of the other party to look into the account or settle, does not amount to a legal tender. — ED.]

THIS was an action of *assumpsit*, brought to recover one half of the value of a dwelling-house, built by the plaintiff upon the land of the defendant. The declaration contained counts for work and labor, for goods sold and delivered, for money had and received, and money laid out and expended, and also for the price or value of a house sold by the plaintiff to the defendant. (*a*)

[*267] *The facts which the plaintiff undertook to prove, in support of his action, at the trial had at the last April term in this county, upon the general issue, before *Jackson*, J., were, that, in the year 1807, the defendant agreed to sell to the plaintiff and his father a small piece of land, on which they proposed to build a house. The price of the land was one hundred dollars.

(*a*) [*Wells* vs *Banister*, 4 *Metc.* 514. — *Doty* vs. *Gorham*, 5 *Pick.* 487. — *Aldrich* vs. *Latham*, 6 *N. H.* 555. — *Harris* vs. *Gillingham*, 6 *N. H.* 11. — *Ashman* vs. *Williams*, 8 *Pick.* 402. — *Morey* vs. *Darling*, 8 *Pick.* 288. — *Woodruffs* vs. *Halsey*, 8 *Pick.* 333. — *Osgood* vs. *Howard*, 6 *Greenl.* 452. — *Washburn* vs. *Sproat*, 16 *Mass. Rep.* 449 — ED.]

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No precise time was fixed for the payment; but the defendant was to give them a deed for conveying the land, whenever they should pay that price, with lawful interest; and he agreed that they might immediately take the land, and proceed to build their house. They proceeded accordingly, the defendant being occasionally present, advising them how to proceed, and fully apprized of their doings. They finished the house in November, 1807, and then removed into it. The plaintiff continued to occupy it until December, 1810, when he removed into another house in the neighborhood, where he had ever since resided.

Nothing more appeared to have taken place between the plaintiff and the defendant until September, 1816, just before the commencement of this action; when the plaintiff made a formal demand of the defendant, for payment of one half the price or value of the house, and of the rent of it, or to be permitted to use it himself.

In 1810, the plaintiff's father had given to the defendant a common deed of release or quitclaim of the same land, which, however, the father alleged was intended only as a mortgage, or security for moneys borrowed of the defendant by him. In 1813, the plaintiff's father proposed to settle with the defendant for the moneys so borrowed, and to pay all that was due therefor, and also the whole that was due for the land, and demanded a deed for the conveyance thereof to himself and the plaintiff. But the defendant refused to look into the accounts, or to make any settlement, or to give any deed. The plaintiff's father did not at that time make a formal tender of the money; but he testified that he had made provision to procure it, and should have procured it, as soon as the amount due had been liquidated.

* The judge, being of opinion that the action could [* **268**] not be maintained upon these facts, directed a nonsuit, subject to the opinion of the whole Court.

Jones and *Dwight* argued for the plaintiff. The statute of frauds does not apply to this case. The plaintiff does not demand an execution of the contract, but relies on the money counts. This action will lie where the defendant is bound in equity and good conscience to pay money. The facts show a case of money paid by the plaintiff on a consideration which has failed. Suppose A agrees to sell a house and land to B, but is not ready to execute his deed; and he permits B to make repairs on the house, and then wholly refuses to make a deed. In such case, B could recover back the money he had expended. (1)

The statute of frauds receives the same construction in a court

(1) 11 *Mass. Rep.* 347, *Boyd* vs. *Stone.*

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of equity, as in a court of law; and where chancery would compel the execution of a contract, a court of law will give damages for the breach or non-performance of it.

If the plaintiff cannot recover, it will follow that he and his father were trespassers, while they were building the house, relying on the good faith of the defendant.

If it is objected that the action should be joint, it is a sufficient answer that the contract is rescinded; and, further, that the release made by the plaintiff's father was a severance of the contract; and being with the assent of the defendant, the plaintiff is entitled to his several action. (2)

Whiting and *Sherrill* for the defendant.

Per Curiam. If the contract set forth in the declaration had been rescinded by mutual consent, or if the defendant had done any act by which it became impossible to perform it, an action would lie for the consideration paid, and perhaps for the labor and services performed, by the plaintiff, pursuant to the contract; and we do not see that the statute of frauds would interpose an obstacle.

[*269] But the case reported does not show such a state of * things. On the contrary, it shows that the plaintiff alone claims to rescind the contract, without offering to perform what he had undertaken on his part. The deed was to be given on payment of a hundred dollars by the plaintiff and his father. That sum has not been paid or tendered. An offer by the father to settle, and a declaration that he would pay the balance, do not amount to a tender; for it does not appear that there were any accounts between the parties, necessarily connected with this contract. The motion to set aside the nonsuit is overruled. (*a*)

(2) 1 *Esp. Dig.* 3. — 1 *Esp. Rep.* 150. — 3 *B. & P.* 162. — 5 *Burr.* 2659. — 5 *Johns* 85, 272. — 9 *Mass. Rep.* 510. — 2 *Day's Rep.* 437.

(*a*) [*Smith* vs. *Burnam*, 3 *Sumner's R.* 435. — *Shepherd* vs. *Spaulding*, 4 *Met.* 416 — ED.]

ARTEMAS THOMPSON *versus* HENRY MARSH AND ANOTHER.

An action lies for a deputy sheriff who has attached chattels on mesne process against another deputy of the same sheriff, who takes such chattels from the possession of the bailee of the first deputy, upon another writ against the same party.

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THOMPSON *vs.* MARSH & AL

THIS was an action of *trover* for a horse. The plaintiff, being a deputy sheriff of this county, had attached and taken the horse on mesne process in August, 1815, as the property of one *Taggart*. The defendant *Marsh*, being also a deputy sheriff for this county, took the same horse in execution, as the property of the said *Taggart*, in March, 1816, from the bailee or servant of the plaintiff. The other defendant was interested in the said execution, although not nominally a party to it; and he went with *Marsh* and showed him the said horse, as the property of the said execution debtor, and directed him to take it as such.

These facts being in evidence at the trial of the cause before *Jackson*, J., at the last April term in this county, the defendants' counsel objected that this action would not lie under such circumstances, for one deputy sheriff against another. The judge, intending to reserve that question for the consideration of the whole Court, permitted the trial to proceed; and the plaintiff obtained a verdict.

If the Court should be of opinion that this action was * maintainable under these circumstances, the verdict was to stand; otherwise the verdict was to be set aside, and the plaintiff to become nonsuit. [* 270]

Hubbard, for the defendants, urged the objection taken at the trial, and he cited, in support of it, the cases of *Draper* vs. *Arnold*, 12 *Mass. Rep.* 449. — *Watson & Al.* vs. *Todd & Al.* 5 *Mass. Rep.* 271. — *Perley* vs. *Foster*, 9 *Mass. Rep.* 112. — *Barkly & Al.* vs. *Kempstow*, *Cro. Eliz.* 123. — *Martyn* vs. *Podger & Al.* 5 *Burr.* 2631. — *Warren* vs. *Leland*, 9 *Mass. Rep* 265. — *Ludden* vs. *Leavitt*, *Ibid.* 104. — *Cameron* vs. *Reynolds*, *Cowp.* 403. — *Ackworth* vs. *Kempe*, *Doug.* 40. — *Woodgate* vs. *Knatchbull*, 2 *D. & E.* 156. — *Bac. Abr.*, *Sheriff*, H.

Gold, for the plaintiff, cited the cases of *Blake* vs. *Shaw*, 7 *Mass. Rep.* 506. — *Pierce* vs. *Jackson*, 6 *Mass. Rep.* 242. — *Grinnel* vs. *Phillips*, 1 *Mass. Rep.* 537. — *Weld* vs. *Bartlet*, 10 *Mass. Rep.* 470. — *Parker* vs. *Kett*, 1 *Salk.* 95.

Per Curiam. The objection taken in this case proceeds upon the ground that all the deputies of the sheriff are but one officer, being all servants of the same master. This arises from a dictum of the late Chief Justice *Parsons*, in the case of *Watson & Al.* vs. *Todd & Al.* The position is true in a limited sense; so that one deputy cannot interfere with another, and take property already in the hands of that other; but this very principle gives a right of action where there is such an interference. Otherwise there would be great confusion and continual contention between deputies.

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Where property is attached by a deputy sheriff, and in his actual or constructive possession, he has the legal custody of the whole, and subsequent attachments can be made only by him. A second deputy, who comes to attach, finding the goods already in legal custody, is bound in duty to deliver his precept to the one who has the goods, and require him to attach. If he do not, he is guilty of a breach of duty, for which he will be responsible.

Judgment on the verdict.

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* BENONI CLARK *versus* BARZILLAI BROWN AND LENI ROYS, his Trustee.

One may be holden as the trustee of another, on account of property in his possession, although such property may not be liable to be attached on mesne process, or seized in execution, [at the time of the service of the writ. — ED.]

THE question which came before the Court in this case was, whether the said *Roys*, upon his answers to the usual interrogatories, was chargeable as the trustee of *Brown*, the principal debtor.

The said *Roys* stated that, about six years ago, he gave to one *Noah Wells* a promise in writing for the tanning of fifty cow-hides into leather of different descriptions. The said note, not long after the date of it, fell into the hands of the said *Brown*, with whom *Roys* treated for its payment. Whether *Wells* endorsed the note to *Brown*, or in what manner it became his property, *Roys* did not know. In May or June, 1816, *Brown* brought and delivered to *Roys* fifty hides to be tanned. At the time of the service of the summons in this case, the hides were in the vats, in the process of tanning. Before the said service, one *Jacob Spoor*, who said he was the agent of *Reuben Wilcox*, called on *Roys*, and notified him that said *Wilcox* was the owner of said hides and holder of said note; but he did not show to *Roys* the note, or any instrument assigning the same or the leather. Afterwards, and after the service of the summons, *Wilcox*, in presence of *Brown*, again notified him that he held, and was owner of, said note and hides; that *Brown* had, in April, 1816, assigned the same to him; and he showed him the note, which *Roys* says he thinks contained an endorsement by *Brown*, transferring the same. Since the tanning of the hides was completed, and since the service of this process

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upon him, *Roys* delivered to *Wilcox* the greater part of the leather, for the tanning of which *Wilcox* gave him credit on his said note.

Howe, for the plaintiff, cited the cases of *Sebor* vs. *Armstrong & Trustee*, 4 *Mass. Rep.* 206. — *Foster* vs. *Sinkler & Trustee*, *Ibid.* 450.

* *Whiting* and *Bernard*, for the trustee, cited the cases [* 272] of *Wrigley* vs. *Geyor & Trustee*, 4 *Mass. Rep.* 102. — *Maine F. and M. Ins. Co.* vs. *Weeks & Trustee*, 7 *Mass. Rep.* 438. — *Bond* vs. *Ward*, *Ibid.* 123. — *Wood* vs. *Patridge*, 11 *Mass. Rep.* 488. — *Gordon* vs. *Webb & Trustee*, 13 *Mass. Rep.* 215. — *Dix & Al.* vs. *Cobb & Trustee*, 4 *Mass. Rep.* 508.

Per Curiam. The facts disclosed by the party summoned as trustee are not sufficient to show an assignment of the hides to *Wilcox*. The note or promise originally given to *Noah Wells*, for work and labor upon hides, was shown to the trustee by *Wilcox* in the presence of *Brown*, who deposited the hides for tanning; and the trustee thinks that he saw an endorsement upon the note. But there is nothing to show that *Wilcox* was purchaser of the hides but his own declaration. There is no evidence that any consideration was paid for them; nor is there any instrument of convey ance which might *primâ facie* prove the assignment.

This property, although not liable to attachment, because not removable without materially injuring it, is nevertheless subject to this process; because the trustee may, according to the statute, keep possession until the property is capable of removal without injury.

It is true, as laid down in the case of *The Maine F. and M. Ins. Co.* vs. *Weeks & Trustee*, cited in the argument, that no one can be charged, unless he be liable in an action to the principal debtor, or have chattels in his possession, liable to be seized and sold on execution. This proposition is, however, applicable to the nature of the property, and not to the time or manner of the liability of the trustee. Thus one cannot be made trustee by reason of promissory notes deposited in his hands, because they cannot be taken in execution. Nor in the case referred to was there any breach of contract, by the supposed trustee, on which an action would lie. But where there is a debt actually due, although not payable, or where there is property deposited, which may afterwards be liable to be seized, it may be holden by this process; and provision is * made in the statute for a [* 273] valuation of it, if it cannot be delivered on execution.

The equivocal manner in which the trustee in the case before us speaks of the endorsement of the note, when shown to him by *Wilcox*, forbids us from considering it as assigned; and even if the

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note for labor, *viz.*, for tanning the hides, had been assigned, some further evidence would be wanted that the hides themselves had been fairly transferred.

Trustee charged.

JOHN WILLIAMS AND ANOTHER, Plaintiffs in Error, *versus* MERAB ROOT.

Under the provision of the statute of 1783, c. 42, § 7, a defendant, in an action before a justice of the peace, may avail himself of the statute of limitations under the general issue; the words "*justification or excuse*" in the statute meaning every matter which may bar the plaintiff's right to recover, whether requiring a special plea by the common law or not.

THE writ of error in this case was brought to reverse a judgment of the Circuit Court of Common Pleas for this county, in an action of *assumpsit* for goods sold and delivered, originally commenced and tried before a justice of the peace, and brought to that court by appeal; the plaintiffs in error having been original plaintiffs and the said *Root* original defendant.

The errors assigned were, that the court permitted the defendant to avail herself of the statute of limitations, under the general issue of *non-assumpsit;* that the plaintiffs at the trial moved the court to allow them to give in evidence that, at a short time previous to the expiration of six years next following the sale and delivery of the said goods and merchandise, they notified the said *Merab* of their said claims, and requested her to pay the same; but she did not agree to do it; which motion was overruled by the said court; and that the said court instructed the jury that, without proof on the part of the plaintiffs that the said *Merab* had promised the plaintiffs to pay them the demand stated in their declaration within six years previous to the commencement of their action,

[* 274] the statute aforesaid * was sufficient to bar them from recovering in their said action.

Gold, for the plaintiffs in error, was aware that, by the statute describing the power of justices of the peace in civil actions, (1) it is provided that in all such actions, with one only exception, not applicable to the present case, "the defendant shall be entitled to all evidence under the general issue, which by law he might avail himself of under any special plea in excuse or justification." But

(1) *Stat.* 1783, c 42, § 7.

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he argued that the statute of limitations was not matter of *excuse or justification*, which must relate exclusively to actions for a tort. If the legislature had intended that defendants were in no case to be held to plead specially, the clause cited would have ended with the words *special plea.*

A provision to the same effect, and quite as general in its expressions, is made by the *Stat.* 1783, c. 38, § 9, in favor of executors, administrators, and guardians; yet, in the case of *Foster* vs. *Abbot, Adm.* (2) the court said that the statute extended to such facts only as went to the merits of the action, but not to statute bars; and instanced the statute of limitations, which, they say, "must always be pleaded, and is *never* given in evidence under the general issue."

The question, whether the evidence offered by the plaintiffs was sufficient to take the case out of the statute, should have been referred to the jury. (3) Although the fact stated and offered in evidence may appear of very little weight, it might have satisfied the jury; and it is well known that very trivial circumstances have been held sufficient to prevent the operation of the statute of limitations.

Jarvis for the defendant in error.

By the Court. The Common Pleas very properly allowed the statute to be given in evidence under the general issue. The action was commenced before a justice of the peace; and the construction of the provision in the statute describing the powers of justices, cited in the argument, and the practice under it, has uniformly been to admit every thing, not matter in *abatement merely, to be given in evidence. The [*275] words *justification or excuse* in that act mean every matter which may bar the plaintiff's right to recover, whether requiring a special plea by the common law or not.

The evidence offered by the plaintiffs in the case before us, with a view to take it out of the statute, *viz.*, that they made a demand to which the defendant would not agree, certainly had no tendency to produce the effect, and was therefore properly rejected by the court.

Judgment affirmed.

(2) 1 *Mass. Rep.* 234.
(3) *Esp. Dig.* 152.—2 *D. & E.* 760, *Lloyd* vs. *Maund.*—4 *East*, 599, *Bryan* vs *Horseman.*—*Ibid.* 604, *in notis, Rucker* vs. *Hannay.*

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Leonard Ross *versus* Joshua Lapham.

In an action for charging the plaintiff with perjury, it is not competent for the defendant to give evidence that the plaintiff had constantly advanced atheistical opinions as the principle of his belief, in mitigation of damages.

The declaration in this action was for slanderous words; alleging that the defendant had, at various times, charged the plaintiff with the crime of perjury.

The general issue was joined, and at the trial thereof, before *Jackson*, J., at the last April term in this county, the defendant, by a motion in writing to the judge, offered to give in evidence, in mitigation of damages, "that the plaintiff constantly from his youth up had advanced, as the principle of his belief, that there is no God, that all existence is the effect of chance, that man perishes at his death like the trees, that he has no soul, that he has no existence beyond the grave, and that he has no accountability hereafter."

The judge overruled the motion; and the defendant filed his exceptions to the said decision, the jury having returned a verdict for the plaintiff. The judge allowed the exceptions; but considering them immaterial, entered judgment, and ordered execution to issue thereon.

Hubbard, for the defendant, moved for a new trial, for the rejection of the said evidence, and argued to the following effect: In the trial of this action, the defendant was allowed to [*276] prove that the plaintiff had in * conversation contradicted his testimony under oath, and to show his manner and appearance while testifying. The reason for admitting this evidence was, that thereby a reasonable suspicion might have been excited in the mind of the defendant, that the plaintiff had not conformed to the obligation of his oath. If to these causes of suspicion atheism were added, the reasonableness of the suspicion would be augmented, and the presumption of malice in the defendant would be lessened. The object of the evidence rejected was the same as of that admitted, and its direct tendency was to render the latter less equivocal.

As the only stable foundation of morality is religion, and as the knowledge or belief of the existence of God is the foundation of al religion, the atheist must be without moral principle. To him an oath is a senseless form of words, an invocation to a Being that with him has no existence; and no blessing or curse attaches to him for uttering truth or falsehood.

Should a person called as a witness avow his atheism, the court would not suffer an oath to be administered to him; and this not

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solely on the ground of technical propriety, but that truth may be established and always proclaimed in courts of justice. It is true that all the sanctions of human laws would attach to the atheist, who testifies falsely, as much as to a person of another character. The reason, then, for rejecting an atheist as a witness is, that the use and object of an oath administered to a witness is not to secure the temporal punishment of its violation, but that truth may be manifested. It is the witness's sense of the obligation imposed on him which begets the legal assurance in his testimony, and makes it more improbable that he will swear falsely. The atheist has cancelled this obligation. He is *extra legem*, and incompetent to be a witness.

An incompetent witness is necessarily, in a legal point of view, an incredible witness; and if a juror is bound to give no credence to testimony, the law will * not imply malice in [* 277] another, who refuses to place confidence in it.

In every action for slander, the defendant has a right to show the general reputation of the plaintiff, in respect to objects comprised in the class or species of calumny complained of; otherwise justice can be done to neither party.

Whatever may be shown, to discredit one compulsorily relating facts as a witness, must be received against him in an action grounded on the truth of his testimony. For it were absurd to say that evidence may be adduced against a witness to discredit and nullify his testimony, and yet that, in an action for impeaching that testimony, that very evidence should be excluded as irrelevant.

Mankind revolt from the atheist, and denounce him as unworthy of belief, not to be endured. Where, then, is the malice in uttering the common sentiments of mankind? It is true, he has all the legal rights of a citizen, and is entitled to the protection of his person and property from the law. But when he prosecutes for an injury to his reputation, what is the consideration for compensation? where the right or title to recover damages? The only allowable measure of damages is the danger of corporal suffering he may be subjected to under the statute of perjury; nothing for loss of reputation, for he can lose none; nothing for the injury done to his feelings, for all humane, social, and religious feelings and sympathies are dead in him.

No oath binding the conscience of an atheist was administered to the plaintiff. A lifeless ceremony was performed over a dead carcass. As to any obligation the plaintiff felt himself under to declare the truth, the charge complained of is as if it had been made against one who had taken no oath.

It is competent for this Court, the main preserver of the public

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peace and morals, to permit this evidence to go to the jury. The civil constitution of the state is expressly bottomed upon principles at war with those delineated in the motion. Common [*278] law is the approved * principles of reason and justice. That God exists is the highest dictate, and that he should be reverenced is the first law, of our nature. The atheist has stifled that dictate, and annulled that law. Suspicion, distrust, and disbelief, attach to whatever he says under oath.

The evidence offered goes invincibly in diminution of damages. A good character is used to enhance the compensation for slander: may not the worst character among mankind go to lessen it? A verdict, which should make no distinction between the claims of a Christian and an atheist, in an action like the present, would be a libel on every thing that is venerable or estimable. The damages, to be exemplary, must be small. Nothing, but an insurmountable rule of law, could compel a Christian jury to give to an atheist in this action one cent damage. A charge of perjury does not defame him; it is only alleging that crime to have been perpetrated which all mankind believed would be perpetrated, when an opportunity presented.

Noble, for the plaintiff. No one is bound to defend himself in a court of justice against charges not contained in the declaration of pleadings. The plaintiff was not obliged, indeed he could not, come prepared to answer a charge such as the defendant would have alleged against him. His general character, as a man of truth, he puts in issue, when he brings such an action as the present. But he is not held to disprove particular charges, whether of crimes, errors, or indiscretions, unless they are pertinent to the issue on trial, and he has had due and legal notice.

It may be said that, with many people, perhaps with a great part of the community, it would not go further to impeach or lessen a man's credibility as a witness, that he was suspected of atheism, than that he was an avowed Universalist, or a believer in the doctrine of absolute irrespective decrees, in relation to the future condition of mankind.

Per Curiam. It is a strong argument against the admission of the evidence offered by the defendant at the trial of this [*279] cause, that, in the whole history of actions * for slander, of which the books are so full, this point does not appear to have been ever taken. Indeed, on principle, independent of the authority which the silence suggested implies, we think the evidence inadmissible. The words charged are in themselves actionable, and the jury are the proper judges of the damages. The evidence has no bearing on the temporal consequence of the crime. It would

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indeed be a singular defence, in a criminal prosecution for perjury, that the person charged with the crime was an atheist.

On the other ground, too, that this evidence was a surprise upon the plaintiff, it was properly rejected by the judge. By commencing this action, the plaintiff put his general reputation at issue. He must be prepared to repel by evidence any attack on his character at large. But evidence of particular facts, however, if proved, it might affect his general standing in society, is not to be received. The particular offered in evidence had no tendency to make it more probable that the plaintiff had committed perjury, or to show it less injurious on the part of the defendant to have charged him with it.

Motion for a new trial overruled.

James Birchard, Jun., *versus* Joshua W. Bartlet.

No action lies against one who had endorsed his name on a negotiable promissory note between other parties.

This was an action of the case, in which the plaintiff declares on a promissory note, dated September 21, 1807, signed by one *Benoni Webb*, and payable to one *Ebenezer Bartlet*, or his order, on the 1st of April, 1803, with interest; and alleges that the defendant afterwards, being the owner of the said note, and being in possession of the same, by his endorsement thereon, acknowledged that he had sold and delivered the said note to the plaintiff, for value received, and promised him that the contents thereof should be paid to him according to its tenor; and that, if it should not be so paid * by *Webb*, he, the defendant, [* 280] would pay the said contents to the plaintiff on demand; that *Webb* never paid the same, nor the defendant, though he had notice, &c., and was requested, &c. The declaration also contained the usual money counts.

In a case stated for the opinion of the Court, it was agreed that the note mentioned in the declaration was executed by *Webb*, and that it was endorsed in blank to the plaintiff, by the defendant, for a valuable and adequate consideration. At the time the note fell due, the plaintiff and defendant lived within four miles of each other in this county. Before the note became due, the said *Webb* removed into the state of *New York*, had ever since resided there, and left no property within this commonwealth; both the parties to this action

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knowing where he resided at the time the note became due, and he being reputed to be a man of property. No demand was made by the plaintiff on *Webb*, nor any notice of non-payment given to the defendant, until about six weeks after the note fell due.

Judgment was to be entered by default or nonsuit, as the opinion of the Court should be on the foregoing statement.

[*Note.* — Before the note was produced, the plaintiff had written over the defendant's name, endorsed on the note, an undertaking and promise conformed to the allegations in the declaration.]

No argument was had.

Per Curiam. This case does not come within any of the decisions which have been made by this Court upon the subject of written contracts. The defendant, whose name is placed on the back of the note, was no party to it; nor does it appear, from the facts agreed, how he became possessed of it.

The note is in its form negotiable; but the payee never negotiated it; at least it does not appear that he endorsed it. The defendant cannot be considered as a surety or original promisor to the plaintiff, because the plaintiff was not the payee of the note.

[*281] If he can be made liable in any way to the plaintiff * it must be on account of some special contract, of which there is no evidence resulting from the facts agreed in the statement. It may be that, holding the note under a delivery from the payee, he delivered it to the plaintiff with his consent that the plaintiff should receive the money due on it. There appears no evidence of any contract whatever with the plaintiff by the defendant. If the plaintiff can produce evidence, that the defendant undertook to guaranty the payment of this note to him, the statement of facts may be discharged, and the parties go to trial. But if no other facts exist than those contained in the statement, the plaintiff must become nonsuit. (*a*)

(*a*) [*Sampson* vs. *Thomson*, 3 *Met.* 275. — *Pierce* vs. *Mann*, 17 *Pick.* 244. — *Sumner* vs. *Gay*, 4 *Pick.* 312. — *Moies* vs. *Bird*, 11 *Mass. Rep.* 440, and note. — *White* vs *Howland*, 9 *Mass. Rep.* 314. — *Baker* vs. *Briggs*, 8 *Pick.* 122. — *Tenney* vs. *Prince*, 4 *Pick.* 385. — *Scalenny* vs. *Hungerford*, 2 *Hill, N. Y. R.* 80. — *Dean* vs. *Hall*, 17 *Wend.* 214. — It would seem to be clear from the authorities that the defendant was liable to the plaintiff upon the endorsement. *Bayley on Bills*, 5th *Lond.* ed. 129—134. — *Tussell* vs. *Lewis*, 1 Lord *R.* 743. — *Bank of England* vs. *Newman*, *Ibid.* 442. — *Nicholson* vs. *Sedgwick*, *Ibid.* 180. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTIES OF HAMPSHIRE, FRANKLIN, AND HAMPDEN, SEPTEMBER TERM, 1817, AT NORTHAMPTON.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES
HON. CHARLES JACKSON, }

LYMAN TAFT *versus* THE INHABITANTS OF MONTAGUE.

Where one had contracted, for a price agreed, to erect a bridge in a particular manner, and he executed it so unfaithfully that, although it served its intended use for a time, yet, from the manner of building it, it gave way, and was finally carried away by a flood, — he could not recover on the special contract, because he had not fulfilled it; nor on a *quantum meruit*, because the defendants had received no benefit from his labors.

THE action was *assumpsit*. The declaration contained several counts; one of which, and upon which the plaintiff relied, was upon a special contract to build a stone bridge, for the defendants, over a small stream of water running across a highway in *Montague*, for which the defendants were to pay one hundred and nine dollars and twenty-five cents; and the bridge was to be built in the manner particularly described in this count. There was also a count upon a *quantum meruit* for the same services.

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At the trial, which was had upon the general issue at *Greenfield*, in the county of *Franklin*, May term, 1816, before *Putnam*, J., the defence was, that the plaintiff had not performed his special undertaking, nor, in fact, done any meritorious service for the defendants.

[* 283] * It was proved that the plaintiff built the bridge in the autumn of 1810, but not in a workmanlike manner. It stood, however, until the spring of 1812, having been occasionally repaired during that period: then the eastern arch of the bridge fell down. The defendants then filled it up, and made it passable, relying upon the other arch as a sufficient passage-way for the water. The bridge stood afterwards until the autumn of 1814, when the other arch fell in. The defendants then determined to rebuild it the next year; and the selectmen in the mean time made some cheap, temporary repairs, which rendered the bridge passable until September, 1815, when it was all swept off by a flood, which occurred on the 23d of that month.

Since that time the defendants have built a new bridge on the same site; but the stones and other materials, of which the bridge that had fallen down was constructed, were so entirely carried away by the flood, that the defendants built their new bridge of other materials and of other stones.

It was proved that the abutments of the bridge which the plaintiff built were made principally of cobble stones, and that these were not well laid together; in particular, that, in the eastern arch, which first fell down, the stones were not bound together at all from the bottom to the top.

It was also in evidence, that, before the contract was made, a committee of the town viewed the place where the bridge was to be built, and ascertained that stones of proper shape and size could be had near the place; and the parties made the contract with the understanding that stones of this description should be put into the work. But the plaintiff did not procure them, although he might have done it, for aught that appeared.

The plaintiff proved that he laid the foundation of the abutments as low as was requisite, and that the bridge was as wide, as high, and as long, as it ought to have been. But it was proved that the stones were not of proper shape and size, and were not laid and bound together in a workmanlike manner.

[* 284] * The jury were instructed that, if they were satisfied from the evidence that the plaintiff had failed to perform his special contract, their verdict should be for the defendants; and that, under the circumstances of this case, nothing was to be allowed under the count for the *quantum meruit*, on the ground that

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the evidence in the case would not warrant a recovery on that count; inasmuch as the defendants had not received any benefit from the ill-directed labor of the plaintiff, but, on the contrary, had been put to expenses and inconvenience in consequence of the non-performance of the contract on the part of the plaintiff.

The jury found a verdict for the defendants; and the plaintiff moved for a new trial for misdirection. If the direction was wrong, or if the plaintiff, under the circumstances of this case, ought to recover, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be rendered according to the verdict.

Bliss and *Mills*, for the plaintiff, contended that, as the plaintiff had completed the bridge of the dimensions and within the time limited by his contract, he was entitled to recover on the special contract. If the work was unfaithfully performed, or the materials not such as they ought to have been, the defendants would have their remedy by action for the fraud. So was the rule laid down by *Buller*, J., in the case of *Broom* vs. *Davis*, (1) which was an exact parallel to the case at bar. The same rule was adopted by this Court, in the case of *Everett* vs. *Gray & Al.* (2)

But if the Court should hold the plaintiff not entitled upon his contract, he must have a claim under his count on a *quantum meruit* for his work and labor, from which the defendants have derived essential benefit. They enjoyed the use of the bridge which the plaintiff built for several years. They made repairs upon it as their own bridge, which proves their acceptance of it.

Ashmun and *Strong*, for the defendants, cited the cases of *Cook* vs. *Jennings*, 7 *D. & E.* 381, and *Faxon* vs. *Mansfield & Tr.* 2 *Mass. Rep.* 148.

*PARKER, C. J. It would be a reproach to the law, [*285] if the plaintiff could recover the stipulated price of the work which he undertook to perform, when, by the evidence in the case, it manifestly appears that the defendants would be entitled to a larger sum from him, as damages for the non-performance of his contract with them. He engaged to erect the bridge of proper materials, and in a workmanlike manner. The verdict of the jury proves that he has not performed this contract; and the evidence reported shows a good foundation for such a verdict.

It is now urged that he may recover the sum agreed upon, and that the defendants must sue him for their damages.

There are cases in the books in which this course has been held to be necessary. Such is that of *Everett* vs. *Gray & Al.* But there the gunlocks, which were the subject of the contract, had

(1) 7 *East*, 480, note. (2) 1 *Mass. Rep.* 101.

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been received, and afterwards proved to be defective; and it was thought that the defendants could not be permitted to show the defect, although arising from fraud in the plaintiff, against his claim for the consideration according to his contract.

The law of that case has since been questioned; and we are certainly not disposed to extend it to cases not exactly similar. (*a*) The ground of the decision was, that the gunlocks were accepted without objection at the time. Now, in the case at bar, there has been no acceptance of the bridge, nor could there have been, without some corporate act on the part of the defendants. The mere passing over the bridge was the act of individuals; and the repairing of it was a work of necessity, the town being obliged to have a passage over the stream. The act of repairing by the selectmen cannot, for the same reason, be construed into an acceptance of the bridge in its imperfect state.

We therefore think the defence set up is sufficient upon the special count; and as the case negatives the supposition [*286] that any of the materials prepared by the * plaintiff went to the use of the town, the other counts are not supported. (*b*)

Judgment on the verdict.

(*a*) [*Chapel* vs. *Hicks*, 2 *C. & M.* 214. — *Allen* vs. *Cameron*, 1 *C. & M.* 832. — *Harrington* vs. *Stratton*, 22 *Pick.* 510. — *Parish* vs. *Stone*, 14 *Pick.* 198. — ED.]

(*b*) [*Stark* vs. *Parker*, 2 *Pick.* 267. — *Shepherd* vs. *Temple*, 3 *N. H.* 455. — *Duncan* vs. *Blundell*, 3 *Stark. Rep.* 6. — *Olmstead* vs. *Beale*, 19 *Pick.* 528. — *Wellington* vs. *West Boylston*, 4 *Pick.* 103. — *Hill* vs. *Green*, 4 *Pick.* 114. — *Moses* vs. *Stevens*, 2 *Pick.* 332. — *Hayward* vs. *Leonard*, 7 *Pick.* 181. — *Phelps* vs. *Sheldon*, 13 *Pick.* 50. — *Smith* vs. *First Society in Lowell*, 8 *Pick.* 178. — *Deusen* vs. *Blum*, 18 *Pick.* 231. — *Holingshead* vs. *Macker*, 13 *Wend.* 276. — *Morris* vs. *Windsor*, 3 *Fairf.* 293. — ED.]

THE FRANKLIN GLASS COMPANY *versus* THOMAS WHITE

An action does not lie for an incorporated manufacturing company against a stockholder, for the recovery of assessments laid by the company.

THIS was *assumpsit* by the plaintiffs, a company incorporated for the purpose of manufacturing glass, against the defendant, a member of the company, to recover the amount of sundry assessments made by the company on the several shares of their capital stock.

The action was submitted to the decision of the Court, on certain agreed facts. The company was incorporated by an act passed the

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6th of February, 1812, (1) with power to hold real and personal estate to a certain amount respectively, and with "all the powers and privileges, and subject to all the duties, requirements, and disabilities, prescribed and contained in an act, entitled An Act defining the general powers and duties of manufacturing corporations." (2)

Amongst the provisions of this last-mentioned act there is one authorizing such companies to assess all requisite sums of money upon the several shares, and in case of non-payment of such assessments by any proprietor for thirty days after the time set for the payment thereof, the treasurer is authorized to sell at auction the share or shares of such delinquent proprietor, sufficient to pay, &c.

The plaintiffs duly organized themselves under their said incorporation on the 1st of March, 1812. On the 31st of March, 1815, the defendant became the owner of one share of the capital stock of the company by purchase. On the 23d of May, 1815, the said corporation made a regular assessment of 125 dollars on each share, on the 12th of June following, another assessment of 50 dollars on each share, and afterwards a third assessment of 50 dollars, payable at certain times fixed by the corporation.

*The defendant was present, and acted as a stock- [*287]
holder at the meetings of the corporation at which the said assessments were made; had often before expressed his desire to have money assessed, to pay the debts of the company; and he afterwards expressed his satisfaction with what had been done, the said assessments being necessary for the discharge of the debts of the company.

The defendant had been duly requested to pay the said assessments, and had refused so to do before the commencement of the present action.

On the facts thus stated, it was agreed that judgment should be rendered upon default or nonsuit, as the opinion of the Court should be upon the right of the plaintiffs to recover in this action.

Ashmun, for the plaintiffs, was aware that the case of *The Andover and Medford Turnpike Corporation* vs. *Gould* (3) would be relied on in the defence; but he contended that a substantial difference might be shown between the two cases. The making and maintaining of a turnpike road is an affair of public concern and public convenience, seldom entered upon or prosecuted for the sake of the profit contemplated to arise to the undertakers; and they cannot lawfully effect their object without authority from the legislature. Whereas a company of manufacturers cannot be presumed to have any object in view but their private or personal

(1) *Stat* 1811, c. 96. (2) *Stat.* 1808, c. 60. (3) 6 *Mass. Rep.* 40

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gains. They could lawfully carry on their business without legislative interference; and they ask for an incorporation merely for the greater convenience in managing their affairs.

By *Stat.* 1810, c. 131, a creditor of any turnpike, or other corporation having power to receive toll, may cause the franchise of such corporation, with any other corporate property, to be seized and sold on execution; and this is the utmost remedy furnished to the creditors of such corporations; whereas, by the statute of 1808, c. 65, above referred to, if an incorporated manufacturing company shall neglect for fourteen days to show to an officer, [* 288] having an execution against the corporation, * sufficient property to satisfy such execution, he may levy the same upon the body or bodies, and the real and personal estate or estates, of any member or members of such corporation. Here is certainly a very essential difference between the two classes of corporations, and which has considerable bearing upon the point in question.

These manufacturing companies, having authority to pledge the personal credit and estate of each individual member, as fully as those of a joint company of merchants or traders unincorporated, are pledged for the fulfilment of their contracts. It should seem, if the corporation pay any money in discharge of such contract, that they should have the same remedy against the individuals for an indemnity as the creditors had before such payment.

The reason given by the court in *Andover*, &c., vs. *Gould*, why *assumpsit* does not lie to enforce the payment of assessments, is that the act incorporating the proprietors of the turnpike prescribes the only mode in which such payment shall be enforced, *viz.*, by the sale of the shares; and the court observe that it must be presumed that the legislature considered this an adequate remedy; for it cannot be supposed that corporate powers were applied for to subject the adventurers to a probable loss.

In the act of 1808, there are no words negativing the remedy sought for in this action; and the principles of the common law and of common right are strongly in favor of it. It is laid down by *Espinasse*, in his digest, and the cases cited in support of the proposition go the full length of it, that "if a person becomes *a member of any society or company*, he thereby agrees to abide by all legal claims arising against him from the by-laws or local regulations of that society to which he belongs." (4)

Allen for the defendant.

By the Court. We cannot perceive sufficient distinction between

(4) 1 *Esp. Dig.* 7. — *Barber-Surgeons' Company of London* vs. *Pelson*, 2 *Lev* 252 *Mayor of London* vs. *Story*, *Carth.* 92.

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the present case and that of the *Andover*, &c., *Turnpike* vs. *Gould*, to justify us in giving to this a *different decision. By the act concerning manufacturing corporations, the sale of the shares of those proprietors who are delinquent in paying their assessments is the only remedy provided for the corporation; and the provision is made in almost the very same words as are used in the general act respecting turnpike corporations. [* 289]

In the case cited from *Espinasse*, the penalties or assessments were set upon the persons, not upon the shares, as is the case under our statutes. Nor does it appear that any specific mode was provided in those cases to enforce payment; whereas it was laid down by Chief Justice *Parsons*, in delivering the opinion of the Court in *Gould's* case, before referred to, "as a rule founded in sound reason, that, when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way."

The remedy provided for creditors of these manufacturing corporations, against the bodies and estates of the individual corporators, does not prove that the corporations have the same remedy against their members.

It is true that a private company of merchants, not incorporated, have their remedy against one of their company who does not furnish his agreed share of the stock; but all the rights and duties of such an association are by the common law; whereas the plaintiffs' are created by statute, and must derive all their rights and remedies from the provisions of the statute.

Plaintiffs nonsuit.

[* 290]

* COMMONWEALTH *versus* AMOS FANNING, in Certiorari.

When the brigadier-general has endorsed a surgeon's certificate of the inability of a private in the militia to do military duty, the court will presume that a previous application has been made to the commanders of the company and regiment.

THE writ was issued in this case at the instance of *Fanning*, the respondent, to bring before the Court certain proceedings had before a justice of the peace for the county of *Hampshire*, upon the complaint of *Timothy A. Phelps*, clerk of a company of cavalry, charging the said *Fanning* with neglect of duty in not attending a muster of the company for the purpose of regimental inspection and review

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The respondent relied, for his defence before the justice, on a certificate of the surgeon of the regiment, that he "was unable to perform military duty, by reason of a lameness in his right knee," &c. On the back of the certificate was a discharge from military duty for the term of twelve months, signed by the brigadier-general. The justice, notwithstanding the said certificate and endorsement, imposed a fine of four dollars on the respondent, on the ground that it was necessary for him to avail himself of the discharge produced, to show that he had applied to the captain of his company and the commander of the regiment or battalion before applying to the brigadier-general.

Bates, in support of the conviction, relied on the point taken before the justice, citing the 29th section of the statute of 1809, c. 108, and also the case of the *Commonwealth* vs. *Smith*, (1) where the same point was taken and sustained by the court. If the respondent had made the proper applications to the commanders of the company and the regiment respectively, it was for him to show it, in order to render the discharge available. Without such evidence it was a mere nullity.

Howe for the respondent.

By the Court. It is necessary to the validity of the discharge relied on in this case, that the previous steps pointed out by the statute be pursued. It is, however, to be presumed, until the contrary is proved, that the brigadier-general would not grant the discharge until he had satisfactory evidence that the
[* **291**] other officers had * been applied to, and had unreasonably refused the party a discharge.

In the case of the *Commonwealth* vs. *Smith*, it was ascertained that those previous steps had not been taken. It was not so here; so the presumption remains without impeachment.

Proceedings quashed.

(1) 11 *Mass. Rep.* 456.

SOUTHWORTH JENKINS *versus* JACOB W. BREWSTER.

Of the rights of assignees of choses in action.

[After notice of the assignment to the defendant, no set-off of any after-accruing demand will be allowed.— ED.]

THIS action of *assumpsit* was brought upon a written memorandum signed by the defendant, hereafter mentioned, for the sum of 812 dollars 88 cents.

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A trial was had upon the general issue, before *Jackson*, J., at the last May term in the county of *Hampshire*.

The evidence was, that, on the 21st of June, 1814, by certain articles of agreement, of that date, made between the plaintiff and one *Sidney P. Brewster*, the son of the defendant, it was agreed that the plaintiff should build and finish a dye-house, of a certain description, on land of the said *Sidney*, near to his woollen manufactory, and furnish it with vats, &c., and that the plaintiff should use and occupy the same, for two years from said date, free of rent; and that, at the expiration of the said two years, the said *Sidney* should pay the plaintiff all the cost of the building and its fixtures.

The plaintiff built and furnished the dye-house; and afterwards, on or before the 30th of January, 1816, the defendant became the owner of the said factory and dye-house; and on the day last mentioned, he and the plaintiff undertook to adjust the accounts of the plaintiff, and the amount due to him according to the said agreement; and the defendant on that day, by a memorandum in writing under his hand, reciting that the account was so settled, and that he found due to the plaintiff the sum of 842 dollars 88 cents, as would appear by the plaintiff's books, promised the plaintiff to pay or account with him for that sum on the 21st of June then next, according to the said articles of agreement between
*the plaintiff and the said *Sidney P.*; and the plaintiff [*292]
signed a receipt on the back of said agreement for the
said sum, as in full for his expenses and labor in building and finishing the said works.

This action was brought on the said memorandum, for the non-payment of the said sum of 842 dollars 88 cents.

It appeared on the trial that the plaintiff had, on the 2d of February, 1816, assigned the last-mentioned contract or memorandum, by his deed written on the back thereof, to two creditors, to secure the debts which he owed them, being 94 dollars 61 cents, and 350 dollars 90 cents; and he authorized them to demand and receive the moneys due thereon, accounting to him for the balance of what they should receive, after satisfying their said debts with interest. The defendant had notice of the said assignment on the 3d of the same February; and he then said that, on a final adjustment, there would be nothing due to the plaintiff. The action was brought and prosecuted by the said assignees, for their own benefit, to the extent of their said demands.

The defendant did not offer to prove that he had made any payment to the plaintiff, or any agreement with him, between the time of his making said memorandum and his receiving notice of its assignment; but he had duly filed an account in set-off, and offered

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evidence in support of it, the charges therein being many of a prior and many of a posterior date to that of the said memorandum. He also offered to prove that, on the said 30th of January, it was agreed, between him and the plaintiff, that this account should be allowed against the demand of the plaintiff on the said written promise or memorandum; and that the reason the said account was not adjusted at that time was, that there were certain bills then outstanding, the amount of which was not known.

The said assignees objected to this evidence, and contended that they were entitled to recover upon the said memorandum,
[* 293] to the extent of their said demands; * and to prove that the said accounts had been adjusted and settled by the plaintiff and defendant, they read in evidence articles of agreement made between the plaintiff and defendant on the 25th of April, 1816, by which, after specifying certain acts to be done by each party respectively, it was declared and agreed that all book accounts between them were settled and closed, and that there was a balance due to the plaintiff of 1565 dollars 27 cents; and this, with a further sum of 500 dollars, which was also to become due in a certain event, was to be paid by the defendant in four equal annual instalments; and he was to give his note therefor to the plaintiff, who was to cancel the memorandum on which this action was brought.

The defendant answered that the plaintiff had not performed the several things which, by the said last articles, he had agreed to; and he contended that, for that reason, he was entitled to prove his said account by set-off. He also offered to prove that, on the said 30th of January, 1816, it was agreed between him and the plaintiff that payment, on account of the sum demanded in this action, should be made in certain cloths, which were afterwards delivered, and were charged in the account so by him filed.

The judge rejected all this evidence in support of the claims made by the defendant by way of set-off, reserving, for the consideration of the whole Court, the question, whether the same ought to have been admitted.

A verdict was taken for the plaintiff, for the sum of 480 dollars 11 cents, the amount due to the said assignees, subject to the opinion of the Court on the afore-mentioned question; the counsel for the plaintiff admitting that the said articles of agreement of the 25th of April, 1816, were a bar to this action, so far as it related to the interest of the plaintiff, and claiming to recover only to the extent of that sum.

Mills, for the defendant, contended that the memoran-
[* 294] dum declared on did not amount to a promise to * pay

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the sum mentioned. The effect of it was no more than an acknowledgment that the defendant had examined the works of the plaintiff, his bills of expenses, &c., and had found the amount to be so much, and that sum he was to account with him for, or to allow in account with him. This was the whole amount of the plaintiff's charge, without taking into view any payments the defendant had made on account of it, or the outstanding drafts made by the plaintiff on him, the amount of which could not then be ascertained. The defendant is fairly entitled to an allowance of these, notwithstanding the assignment of the plaintiff's claim. The claim of the assignees is an equitable one only; and they ought to do as well as demand equity. Besides, when they exhibited the assignment to the defendant, and until then, they had no claim; even in equity, they were informed that, on a final adjustment of all demands between him and the plaintiff, there would be nothing due to the latter.

Bates for the plaintiff.

Per Curiam. We have no doubts that, but for the peculiar circumstances of this case, an account might have been properly filed by the defendant under the statute; but, after the assignment of the contract, and notice thereof to the defendant, he could not, by any act of his, deprive the assignees of their rights under the assignment. It is true that the articles entered into between the parties on the 25th of April rendered the promise, on which this action is brought, of no validity as between those parties; but that transaction could not affect the assignees. The defendant may have his remedy on the plaintiff's covenant; but he cannot set off his claims in this action. (*a*)

Judgment on the verdict.

(*a*) [The Court seem to entirely overlook the offer of the defendant to prove that, before the notice of the assignment, he had demands against the plaintiff which might then legally be made, and were agreed to be made the subject of set-off against the plaintiff's demand in the present suit, and asserted his right to this set-off at the time when he received such notice. For this reason the decision seems to be erroneous. — ED.]

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*MARY SWAN, Administratrix, &c., *versus* OLIVER WILKINSON.

If a feme sole administratrix marry pending an action commenced by her, the suit abates.

AT the last May term of this Court at *Greenfield*, in the county of *Franklin*, this action came up by appeal from the Circuit Court of Common Pleas, where there had been a trial upon the merits, and a verdict. At that term the defendant pleaded the marriage of the plaintiff since the appeal in abatement of the suit. The plaintiff demurred to the plea, and the defendant joined in the demurrer.

Alvord, for the plaintiff. The administration was not extinguished by the marriage. Administration may be originally granted to a feme covert, who is next of kin to the intestate. (1) In the case of *Quick & Ux.* vs. *Staines*, (2) the executrix had married, and afterwards brought an action as executrix, in which her husband joined, and this point was not thought of, though the cause was sharply argued. By our statute of 1783, c. 24, § 19, it is provided that, when a feme sole shall, jointly with one or more persons, be appointed executrix or administratrix, and after such appointment shall, during the life of the co-executor or co-administrator, marry, such marriage shall operate as an extinguishment or determination of such woman's power and authority. The inference from this provision is irresistible that the marriage of a feme sole executrix, when no other is united in the trust with her, does not determine the trust.

Though an action commenced by a feme sole in her own right abates by her marriage, it is not so when the action is *an auter droit*, as executrix or administratrix. Chattels which the wife
[*296] has as executrix or administratrix *are not vested in the husband by the marriage. (3) Of course the right of action in such capacity remains to her.

Newcomb, for the defendant, contended that the plaintiff, not being liable to an action as administratrix, could not be entitled to sue; and no process lying to compel the husband to become a party, the suit must abate. By the statute of 1808, c. 98, a feme sole guardian marrying, the trust is thereby extinguished. The same reason existing in the case of an executrix or administratrix,

(1) *Com. Dig.*, title *Administration*, D; also *Administrator*, B, 6· also *Baron and Feme*, P, 3.
(2) 1 *B. & P.* 292. — See, also, 2 *W. Black. Rep.* 801.
(3) *Com. Dig.*, *Baron and Feme*, E, 3. — *Co. Lit.* 351.

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the sense of the legislature on the present question may be plainly inferred.

Per Curiam. We know no distinction, as to the question in this case, between a feme sole commencing an action in her own right, or as executrix or administratrix. Her marriage pending the suit abates it in either case. The plaintiff's rights remain to her, but her husband must join her in an action in which she would vindicate those rights.

Defendant's plea good. (*a*)

(*a*) [*New* vs. *Maxcy*, 17 *Mass. Rep.* 341. — ED.]

THE STATE OF CONNECTICUT *versus* JOHN BRADISH.

An inhabitant of another state is a competent witness in the trial of an action to which such state is a party.

One who takes a conveyance of land, knowing that the grantor had previously conveyed it to another, cannot hold it against the first purchaser, although the first conveyance be not recorded. But if the second purchaser produces his deed to be recorded before the other, and then sells the land *bonâ fide*, and for a valuable consideration, to a person wholly ignorant of those circumstances, the latter will hold the land against the first purchaser; and this whether the conveyances be conditional by way of pledge, or absolute.

THIS was a writ of *entry sur disseisin*, which was tried upon the general issue before *Putnam*, J., at the sittings here after September term, 1815. To maintain the issue on the part of the demandants, they gave in evidence a deed of mortgage, made to them of the demanded premises on the 9th of February, 1802, by one *Seth Clark*, conditioned to pay his bond to them of that date for 1000 dollars, with interest in one year, acknowledged and recorded on the day of its date. The said * bond was [* 297] also produced. The interest appeared to have been paid to the 2d of September, 1807.

They also gave in evidence another mortgage deed for the same debt, made to them on the 6th of October, 1807, by one *Laban Thurber*, conditioned for the payment of 1000 dollars, on demand, with interest from the 2d of September preceding; and a bond of said *Thurber* for the said sum, payable to them as aforesaid. The said mortgage deed was acknowledged, and it was recorded on the 9th of April, 1808.

The tenant claimed under *J. & H. Dwight*, mortgagees of said

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Thurber, and produced a deed from *Thurber* to said *Dwights*, dated the 7th of April, 1808, acknowledged on the same day, and recorded on the 8th of the same April, conditioned for the payment of several promissory notes from the said *Thurber* to the said *Dwights*, which were also produced; also an assignment from them to the tenant in due form of law, dated the 15th of April, 1809, acknowledged and recorded; also a copy of a deed of release, from the demandants to said *Clark*, of their right in the premises, referring to the first mortgage. This release was dated the 6th of October, 1807, and acknowledged; and it was recorded on the 9th of April, 1809.

The demandants offered *A. Kingsbury*, Esq., the treasurer of the state of *Connecticut*, as a witness; and he was admitted, the tenant objecting. They also offered a letter from the said *Dwights* to the said *Kingsbury*, as evidence that the said *Dwights* knew of the mortgage of the said *Thurber* to the demandants before *Thurber's* deed was made to the said *Dwights*; which letter was admitted, notwithstanding the objections of the counsel for the tenant. There was no evidence offered that this was an original letter, excepting the testimony of said *Kingsbury*, that it was the same which he received in answer to one which he had addressed to them; and no notice was proved to have been given to the said *Dwights*, or to the tenant, to produce the original letter from said *Kingsbury* to them; but no fraud in respect to the letter was suggested.

[* 298] * The judge instructed the jury that the tenant was in no better condition than the *Dwights*, his assignors; that if, from the evidence in the case, they were satisfied that the *Dwights* knew of *Thurber's* mortgage to the demandants, before they took their mortgage from *Thurber*, the demandants were entitled to a priority, and to recover in this action; otherwise that the tenant ought by law to prevail.

A verdict was given for the demandants. But if the said *Kingsbury* ought not to have been admitted as a witness, or the letter of the said *Dwights* to him ought to have been rejected, or the direction to the jury was wrong, a new trial was to be granted; otherwise judgment was to be rendered upon the verdict.

The cause was argued, at the last September term, by *Bliss* and *Strong* for the demandants, and *Ashmun* and *Mills* for the tenant.

For the tenant it was contended that *Kingsbury* was an incompetent witness. He was directly interested in the event of the suit, and, indeed, was a party to it. It is of no importance that his interest was minute. One man's mind may be influenced by a motive that would be perfectly inoperative upon another's. It is

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therefore that the rule is absolute, that no person interested in a suit shall be a witness. A case in 2 *Lev.* 231 seems opposed to this doctrine. But there the witness was admitted on account of the remoteness of his interest, not on account of the smallness of it; and *Buller* doubts whether that case be law. (1)

The practice of our own courts has conformed to this principle; members of corporations, parties to a suit, having always been rejected as witnesses, without any reference to the amount or value of their interest; and a statute was found necessary to change the law in this regard, as it related to inhabitants of towns and par ishes. (2) In *England*, also, several statutes have been made, to alter this rule of the common law, and to permit corporators to be witnesses in certain cases.

In the present case, there was no necessity for Mr. *Kingsbury* to testify, since, with the use of ordinary
* diligence, other witnesses might have been obtained [* **299**] of the facts testified by him, if true.

The letter of Messrs. *Dwights* was not admissible evidence, without other and better proof of its authenticity. The witness was not in the habit of corresponding with them, and, indeed, had never seen their hand-writing: his testimony, then, on this point was of no effect. If the letter was genuine, there must have been other means of proving it, in the power of the demandants, less objectionable than the one they used.

The tenant is not exactly in the place of the *Dwights*. He purchased *bonâ fide*, and for a valuable consideration. Their knowledge of the prior conveyance ought not to affect him. (3) A fair purchaser of an absolute estate without notice is protected; and there appears no reason for a different principle in cases of mortgage.

The counsel for the demandants (being informed by the Court that they need not argue the competency of Mr. *Kingsbury* as a witness) contended that the letter of the *Dwights* was competent evidence; and it was well left to the jury to judge of its genuineness and effect. Since it was received by mail, in answer to one written to them by *Kingsbury*, it furnished a legal presumption that *Kingsbury's* letter, giving notice of *Thurber's* mortgage, had been received by them. It was not necessary to prove their hand-writing, since, for the purpose for which the letter was introduced at the trial, a letter written by their order would have had the same effect. There

(1) *Bull. N. P.* 290. (2) *Stat.* 1792, c. 32.
(3) 1 *New. Rep.* 332, *Doe* vs. *Martyn.* — 10 *Johns.* 135, *Jackson* vs *Henry.* — 2 *Mass. Rep* 506, *Norcross, Ex.*, vs. *Widgery.* — 4 *Mass. Rep* 637, *Furnsworth* vs. *Childs.*

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was no necessity of notice to produce *Kingsbury's* letter. It was not in the keeping of the tenant, and the *Dwights* were not parties nor witnesses. (4)

The tenant can be in no better plight than the *Dwights*, his assignors. He cannot be said to have purchased without notice of a prior encumbrance. *Thurber's* mortgage to the demandants was on record more than a year before the assignment of the *Dwights* to him: he ought to have seen this, and should have been put on his guard. (5)

[* 300] * The cause was continued *nisi*, and at the last April term here the opinion of the Court was pronounced by

JACKSON, J. As to the first point, we see no sufficient objection to Mr. *Kingsbury* as a witness. The case of one sovereign becoming a party in the judicial courts of another is novel, and perhaps wholly unknown in the common law. But we constantly find the sovereign, both here and in *Great Britain*, a party in suits in their own courts; and it was never imagined that all the citizens or subjects of the government were incompetent witnesses in such suits because the government might be enriched by them.

As to the letter of *J. & H. Dwight*, which was read in evidence, it is not very important to consider the question; because, on the new trial, which must be had in this case, one or the other of the parties can undoubtedly produce such evidence as will put it out of doubt. It appears, however, to us, that the letter was properly admitted at the trial, upon the evidence that was then offered of its authenticity.

The third is the most important point in this case; and upon that we are, on the whole, satisfied that there ought to be a new trial. A person who takes a conveyance of land, with knowledge that the grantor had previously conveyed it to another, cannot hold it against the first purchaser, even though the first conveyance is not recorded. It would be fraudulent in him to attempt thus to deprive the purchaser of the fruits of his contract. If the grantor can be considered as having any title or estate after the first conveyance, it is merely the legal estate which he holds in trust for the first purchaser; and the second, purchasing with knowledge of the trust, shall hold subject to the same trust. But if the second purchaser procures his deed to be recorded before the other, and then sells the land *bonâ fide*, and for a valuable consideration, to a person wholly ignorant

(4) *Peake's L. of Ev.* Appendix, 40. — 1 *Esp. Rep* 326, Lord *Barrymore* vs. *Taylor*. — 3 *Esp. Rep.* 64, *Runquist* vs. *Ditchell*.

(5) *Powell on Mortgages*, 601, 602, cites 1 *Vern.* 484. — 2 *Johns.* 595, *Clute* vs *Robison*.

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of those circumstances, the latter will hold the land against the first purchaser.

If this were not so, our laws, which require the registering of deeds, would be useless, if not worse; because *a [*301] purchaser, after the most thorough examination in the registry of deeds, and finding a succession of conveyances, all in legal form and in perfect order, might still be evicted upon proof of a secret trust, or a fraud, on the part of some former owner.

We can see no difference in the application of these principles, when the conveyances are absolute, and when they are made as a pledge or security for a debt. A mortgage furnishes no security for a debt unless it enables the grantee to hold the land absolutely, if the debt is not paid, in the same manner as he would have held it if the original conveyance had been without condition.

The question in this case has no connection with the principles which regulate the assignment of a *chose in action*. If *Thurber* had given a bond to the *Dwights*, with a mortgage to secure it, and the *Dwights*, before their assignment to *Bradish*, had received payment of the bond, or had given a defeasance of it, *Bradish*, as assignee, would be bound by those acts, although they had been wholly unknown to him. This is the whole effect of the case of *Clute* vs. *Robison*, which was cited in the argument. It is true that, if by any such defence the assignee is prevented from recovering the money appearing to be due on the bond, he will also lose all benefit from the mortgage. But this arises, not from any defect in the title to the land, or in the manner of conveying it, considered by itself; but is only an incidental consequence of the discharge or avoidance of the bond for which the land is pledged.

So, if the notes given by *Thurber* to the *Dwights* had been overdue at the time of the assignment, *Bradish* would have taken the notes, subject to any defence that could be made to them by *Thurber*; and if such a defence should prevail, it would virtually defeat and avoid the mortgage in the hands of *Bradish*. But if the money expressed in the notes is due, and payable to *Bradish*, by force of the assignment to him, the question whether he shall hold the land as security for that money must be decided like any other question relating to the same land.

*The only case cited in the argument, which seems [*302] to militate with our opinion upon this point, is that of *Walley* vs. *Walley & Al.*, in 1 *Vern.* 484. This case is cited by *Powell* on mortgages, as showing that the assignee of a mortgage will be affected by notice to the assignor of an outstanding title to the land mortgaged, and will take subject to that title. The case furnishes no authority to that point. It was proved that the assignee,

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at the time of the assignment, had actual notice of the outstanding title, and therefore this question could not arise; and accordingly it is not noticed in the opinion of the court. It was, indeed, contended in that case, by the counsel for *Warner*, one of the defendants, that, although it was proved that he had notice of the outstanding title, yet that it did not appear that his assignor (*Gandy*, another defendant) had such notice. To this it was answered, by the counsel for the plaintiff, that, as *Warner* had purchased with full notice, he could not defend himself as an innocent purchaser; and that, if he would mend his case on the pretence that *Gandy*, his assignor, had no notice, he must stand in *Gandy's* place; and then the confession of *Gandy*, (in his answer to the same bill,) that he had notice, would bind *Warner*. This argument of the plaintiff's counsel, if it had been adopted by the court, would by no means prove that if *Warner* had had no notice himself, and was defending himself as an innocent purchaser, he would be affected by such notice to his assignor.

It was further said, in the argument of the case at bar, that the deed under which the demandants claim being registered before the assignment to *Bradish*, although after the conveyance to the *Dwights*, *Bradish* might and ought to have known that there was a prior conveyance.

This is at most only evidence to show that *Bradish* did know the fact; and if, from this or any other legal evidence, the jury should find that he did know it, his title would be void as against the demandants; or rather his mortgage would be postponed to theirs.

But we certainly cannot say that he shall be presumed,
[*303] * from this circumstance, to know of the prior conveyance.

When a purchaser is examining his title in the registry of deeds, and finds a good conveyance to his grantor, he is not expected to look further. This case, it is true, presents the question in a very strong point of view for the demandants; as *Bradish* had only to look to the registry for the next day, and perhaps only to the next page, to discover this prior conveyance to the demandants. But if he is required to look one day, or one page, beyond that which exhibits the title of his grantor, it will be impossible to say where the inquiry shall stop. The verdict is set aside, and a

New trial granted. (*a*)

(*a*) [*Somes vs. Brewer*, 2 *Pick.* 184 — *Hall vs. Bigelow*, 16 *Mass. Rep.* 406. — ED.]

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JOHN PEIRCE *versus* WILLIAM BUTLER.

Of demand on the makers, and notice to the endorsers, of promissory notes.
The maker of a promissory note is not a competent witness for the endorser, in an action by the endorsee against the endorser, unless released.
[The usage of the bank, where a note is made payable, as to demand and notice, is not binding on the holder, unless he be cognizant of it; in which case it is binding on him. The words "for renewal," written near the bottom of the note in the hand-writing of one of the makers, does not destroy the negotiability of the note, or necessarily affect the holder with such notice that the burden of proof is put upon him to show that he is a *bonâ fide* holder. A party who puts in evidence the deposition of a witness, cannot afterwards put in evidence, at the same trial, any other writing of the witness under his hand to contradict his testimony.—ED.]

THIS was an action of *assumpsit* upon a promissory note, dated January 9, 1813, made and signed by *F. & C. Dickinson*, for 1000 dollars, payable to the defendant or his order, in six months after the date, at the *Hartford* Bank, and endorsed by the defendant.

At the trial of the cause, which was had on the general issue, before *Jackson*, J., at the last May term in this county, it appeared that the defendant and the said *F. & C. Dickinson* lived at *Northampton* when the note was made. The plaintiff then lived at *Hartford*, in the state of *Connecticut*, but afterwards, and before the note became payable, had removed to the state of *New York*. The words "for renewal" were written near the bottom of the note, at the left side; and it appeared that they were in the hand-writing of the said *F. Dickinson*, and not in the same writing as the body of the note.

The plaintiff, to prove a demand of payment on the makers, and notice of non-payment to the defendant, produced two depositions of one *N. Knox*, the cashier of * the *Hart-* [* 304] *ford* Bank, in the year 1813; and to prove what had been the usage and course of business at the said bank, and also to prove the demand on the said makers of the note.

[The said *Knox* testified that the note sued in this action was left for collection at the said bank a few weeks before its maturity; that, on the day it fell due, payment was demanded at the bank, but not made; and that, on the same day, after the bank closed, it was delivered to *George Beach*, as agent to *Peirce*, the endorsee. In the second deposition, he stated that the practice of the bank was to give notice on all notes left for collection, in the same manner as on notes discounted by the bank, when the parties live in the

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city, and the days of grace the same, *viz.*, three; that it was not the practice in all cases to give notice to endorsers out of the city on notes lodged for collection, though it was frequently done, and always when requested by the person lodging the notes. When not requested, it was left to the lodger of the note to give the notice. It was generally the practice of the bank to give notice on discounted notes, to the drawer and endorser, on or before the day on which the note became due, in cases where either of the parties had failed; and then to give notice again to the endorser on the evening of the last of the three days of grace, if the note was not paid.]

He also produced two depositions of one *George Beach*, and one of one *John Law*, and another of one *John Babcock*, to prove due notice to the defendant as endorser. The defendant produced on this point another deposition of the said *George Beach*, and contended that he was not duly authorized, as the agent of the plaintiff, to give notice in his behalf to the defendant. The evidence on the point of notice was left to the jury, who decided that the said *Beach* was duly authorized, as such agent, to give the notice to the defendant.

The counsel for the defendant also wished to argue to the jury the question whether, upon the whole of the said evidence, it appeared that the demand on the said makers of the note, and the notice to the defendant, were in other respects sufficient [*305] to bind the defendant. *But the judge informed the counsel that this appeared to him unnecessary, because he should instruct the jury that, if they believed the facts testified by the said *Knox*, *Beach*, *Law*, and *Babcock*, on this point, they ought to find that the said demand and notice were in those respects legal and sufficient. As there was no evidence to contradict the above-mentioned deponents on this point, it was not argued to the jury; and the judge instructed them in the manner above-mentioned.

The defendant then contended that the said note was endorsed by him for the accommodation of the said makers without any consideration; that it was intended to be given in exchange or renewal for some other note signed and endorsed in like manner; and he produced evidence tending to prove that the said *F. & C. Dickinson* failed in business in the latter part of March, 1813, and that the note now in suit was at that time in the hands of one *Thomas Lloyd*, who had been the broker and agent of the said *F. & C. Dickinson*, in *Hartford*; that it must have been negotiated and delivered by said *Lloyd* to the plaintiff (if it ever was so delivered) after the said failure was generally known in *Hartford*.

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particularly at the *Hartford* Bank. He contended that the said words, "for renewal," so written on the note, with other circumstances proved, or to be inferred from the evidence in the case, must have given sufficient notice to the plaintiff that the said *Lloyd* had no right to sell and dispose of the note to him in the manner aforesaid; and he proved that the said words, "for renewal," when so written on a note, were generally understood to indicate that the note was made and intended to meet, or be substituted for, some preceding note, although they might not always imply that such preceding note was made and endorsed by all the same persons whose names appeared on the note to be substituted. Upon the suggestion of the defendant's counsel that the plaintiff, under these circumstances, could not recover, without showing himself to be a *bonâ fide* holder of the note, the judge intimated that this was a question of fact, in which the Court could not undertake to judge * of the weight of evidence. Where- [*306] upon the defendant also produced the deposition of the said *Lloyd*, originally taken in explanation of a deposition given by him at the request of the plaintiff; but which latter, although filed, was not used by either party at the trial. In the deposition thus produced by the defendant, the deponent states the manner in which he transferred the said note to the plaintiff, and the consideration therefor.

The counsel for the defendant wished to argue this point also to the jury; but the judge informed them that the effect of the said words, "for renewal," with the usage or understanding proved in relation to them, would be reserved for the consideration of the whole Court; and that it appeared to him unnecessary to argue the other part of this question; because he should instruct the jury that, if they believed the facts testified by the said *Lloyd* in his said deposition, they ought to find that the said note was duly and legally transferred to the plaintiff; and that there was no objection, on this account, to his recovering in this action. This point was not argued to the jury, and the judge instructed them upon it in manner above mentioned.

The defendant offered the deposition of the said *F. Dickinson*, one of the makers of the note; but this was objected to, and rejected.

The defendant then contended that, if the said *Lloyd* had taken the said note to his own account, and had negotiated it for his own benefit, as stated by him in his deposition, the note was void by reason of usury in such negotiation between the said *Lloyd* and the said *F. & C. Dickinson*. In support of this objection, the defendant stated that, in the account current between those parties, which

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is mentioned in said *Lloyd's* deposition, the former had charged the latter with interest at the rate of more than six per cent. on moneys advanced by him for them; and that this rate, if retained by the said *Lloyd*, as stated in his deposition, was retained towards the amount due to him on that account.

To prove this fact, and also to prove that the note against the defendant and the said *F. & C. Dickinson*,
[*307] *which was taken up by *Lloyd* in January, 1813, as stated in his deposition, was substantially paid or considered by *Lloyd* himself, in February, 1813, to be paid by the makers, the defendant offered a paper, proved to be in the handwriting of *Lloyd*, and containing charges and credits, and striking a balance of 3205 dollars. This paper was in the form of a common account current, but contained no names of the debtor or creditor therein, and had no signature at the foot thereof; the columns were not added up, and it had no date at the bottom, as of an account settled; but credit was given under date of February 5, 1813, for a note for the said balance of 3205 dollars. The defendant further proved that the said *Lloyd* had recovered judgment against the said *F. & C. Dickinson* on a note given by them to him on the 5th of February, 1813, for 3205 dollars; and he further contended that it appeared, from this account or paper, coupled with the said deposition of *Lloyd* and the said judgment, that the said *Lloyd*, at the time of the failure of the said *F. & C. Dickinson*, had, in substance, received payment from them of the note taken up by him in January, 1813; or, at least, had waived any claim to hold this note, as security for the money paid on that, and that he had no right to retain or negotiate the note now in suit in manner aforesaid.

The judge was of opinion that, as the deposition of *Lloyd* had been introduced by the defendant, he could not impeach the deponent, nor contradict his testimony by any such paper proved to be his hand-writing; and that, in any other view of the case, this paper was inadmissible in evidence; and it was accordingly rejected.

The defendant also offered, for the same purpose, and in connection with the paper last mentioned, another paper or account. This was regularly headed as an account current between *Lloyd* and *F. & C. Dickinson*. It was not written by *Lloyd*, nor signed by him, nor by any other person; but there was a memorandum upon it, written with a pencil by *Lloyd*, connecting it, as the defendant contended, with the other paper. This was also rejected.
[*308] *These two last papers, and also the depositions

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before mentioned, were to be referred to, if necessary, in the argument of the cause.

If the Court should be of opinion that the plaintiff, upon the whole of the case, was not entitled to recover, or that any of the said opinions and directions of the judge were wrong, or that any of the said evidence, so rejected, ought to have been admitted, the verdict which was returned for the plaintiff was to be set aside, and a new trial granted; otherwise the verdict was to stand, and judgment to be entered accordingly.

Strong, on the part of the defendant, moved for a new trial for a misdirection of the judge; and he contended, in the first place, that the evidence of notice to the defendant of the non-payment of the note was insufficient. The note, by the terms of it, fell due on the 9th of July; yet there was no attempt to give notice until the 12th of the month. The note was not made payable with grace; nor was there proof that, by the law of *Connecticut*, grace was to be allowed on all notes and bills of exchange. Although it was proved that it was the custom of the *Hartford* Bank to allow days of grace, yet this could have no effect in the present case, unless a knowledge of the usage was brought home to the defendant, which was not attempted. (1)

The custom of this bank, with the exceptions stated in *Knox's* depositions as to notice where parties had failed, ought to have been referred exclusively to the jury. But the judge construed the depositions, directing the jury that, if they believed the facts as stated in those depositions, the plaintiff's case on this point was proved. The defendant insists that the whole evidence should have been submitted to the jury without their being limited or restrained by such instructions.

The usage, if proved, was proved to be to give notice to the maker and endorser on or before the day on which the note became due, in cases where either of the parties had failed, and then to give notice again to the endorser on the last of the three days of grace, if the note then remained unpaid. But the evidence in
* this case was only that notice was given to the de- [*309]
fendant on the day after the last day of grace; so that the plaintiff has not brought himself within the usage.

The evidence of the object for which the note was created should have been left to the jury. The memorandum "for renewal," which probably induced the defendant to put his name upon the note, showed that it was solely intended to meet a prior note

(1) 9 *Mass. Rep.* 157, *Lincoln and Kennebeck Bank* vs. *Page.* — 11 *Mass. Rep.* 85, *Blanchard* vs. *Hilliard.* — *Ibid.* 87, *in notis*, *Wentworth* vs. *Clap.*

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That note having been paid and taken up by *Lloyd*, as the agent of the makers, and this within the knowledge of the plaintiff, the note now in question was, so to speak, *functus officio*, and ought to have been cancelled; or at least the burden was thereby shifted, and the plaintiff should have been held to prove that he was a *bonâ fide* holder of the note, having had it duly and legally assigned to him. (2)

The deposition of *F. Dickinson* ought to have been admitted. (3) He is, at all events, liable to payment of the note, and therefore stands indifferent between the present parties. This is not within the case of *Churchill* vs. *Suter*. (4) There the evidence was to show the note void from an original canker, into whose hands soever it might pass. But the evidence here did not go to avoid the note in the hands of a *bonâ fide* holder. (5)

The accounts offered in evidence should have been admitted as part of the *res gestæ*. They went to show that *Lloyd* had paid the former note, charged its amount to the *Dickinsons* also, and had settled the account. They would have proved that the note was originally usurious and void. (6)

The defendant, being merely an accommodation endorser, is chargeable, at the utmost, for no more than the plaintiff has fairly paid. The direction of the judge, on the subject of damages, was therefore wrong. (7)

Mills for the plaintiff.

JACKSON, J., delivered the opinion of the Court. On the first point, which has been argued in this case, we are all of opinion that the direction to the jury, as stated in the report of the [* 310] trial, was wrong, and that * there must be a new trial. On examining the depositions referred to in that part of the report, there appears to be no evidence, and, indeed, there is no attempt to prove, that the defendant had any knowledge of the usage and course of business at the *Hartford* Bank. As the note does not purport to be payable with grace, the demand of payment and notice of non-payment were too late, unless the defendant was bound by that usage.

When this question was first suggested on the present argument, I doubted whether it was open to the defendant. On the trial of

(2) 4 *Esp. Rep.* 54, *Kufh & Al.* vs. *Watson & Al.* — 1 *Campb. Rep.* 100, *Duncan* vs *Scott.* — 2 *Campb. Rep.* 574, 596. — 10 *Johns. Rep.* 231, *Woodhull* vs. *Holmes.*

(3) 1 *Esp. Rep.* 332, *Staples* vs. *Okines.* — 1 *Campb. Rep.* 246. — 10 *Johns. Rep.* ub sup. — *Esp. Dig.* 708, *Levi* vs. *Essex.*

(4) 4 *Mass. Rep.* 161.

(5) 2 *East's Rep.* 458, *Birt* vs. *Kershaw.*

(6) 3 *Johns. Cases*, 66.

(7) 1 *Esp. Rep.* 261, *Wiffen* vs. *Roberts.* — 7 *Johns.* 361, *Brown* vs. *Mott.*

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the cause, the evidence of the demand, and of the notice to the defendant, was objected to as insufficient for sundry other reasons, some or all of which have been again urged on this argument. My impression was, that these were the only points presented in this part of the report; and I was not aware that it had ever been made a question whether the defendant was bound, provided the demand and notice were conformable to the usage and course of business. I have not now any recollection that this point was raised at the trial; but as it is said by the counsel for the defendant that they have always relied on it as material in the defence, and as the language of the report is obviously broad enough to include it, there can be no doubt that the defendant has a right to insist upon it.

As there is to be a new trial, we have thought it proper to express our opinions on the other points that have been argued in this case, in order to prevent further delay and expense to the parties.

In every trial by jury, it is the duty of the judge to decide all questions of law that may arise. When evidence is produced by either party, it is for the jury to say whether they believe the fact which the party attempts to prove by it; and if the material fact is not itself directly proved, but is to be inferred from other facts, it is for the jury to draw that inference. So, when a witness testifies directly to any material fact, which is not rebutted by any evidence on the other side, *it is the province of [*311] the jury to decide on the credit to be given to the testimony; but it is for the judge to declare its legal effect and operation. It is almost always expedient, and it is sometimes necessary, in such a case, for the judge to express his opinion to the counsel; as it not only saves time and trouble to all who are concerned in the trial, but also takes away the occasion of arguing to the jury on a mere question of law, which ought never to be allowed in a civil action. The mistakes of a jury, if they should commit any, on such a question, cannot be easily discovered; whilst those of the judge must be known, and will be readily corrected by the whole Court.

As to the first exception which is mentioned in the report, we are all of opinion that the demand of payment on the promisors, and the notice to the defendant, as stated in the depositions referred to in the report, were in conformity with the usage and course of business at the *Hartford* Bank, as proved by the same depositions; and were therefore sufficient to bind the defendant, if he had been conusant of that usage.

As to the next point, the defendant's counsel having produced evidence tending to show that *Lloyd*, who negotiated the note in question to the plaintiff, could not have recovered judgment upon it

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against the defendant, and that the plaintiff was probably apprized of those circumstances when he took the note, they contended that the plaintiff could not recover in this action, unless he proved that he was a *bonâ fide* purchaser and holder of the note. It was obviously a question for the jury, whether those suggestions respecting *Lloyd* were true, and how far the knowledge of the facts was brought home to the plaintiff; and if the evidence on this point had stopped there, these questions would have been left to the jury But the defendant's counsel, not thinking it safe or proper to rely on this evidence, produced a deposition of *Lloyd*, in which he undertakes to state the facts relating to his transfer of the note to the plaintiff. Still it was a question for the jury, whether [*312] this statement by *Lloyd* was true. But as it * was contained in a deposition produced by the defendant himself, his counsel did not undertake to argue against it. We are all satisfied that the facts there stated, if believed by the jury, were sufficient to show that the note was duly transferred to the plaintiff, and that the instruction to the jury was in this particular correct.

We are also of opinion that the words "for renewal," written at the bottom of the note, did not destroy its negotiability; and that, when taken in connection with *Lloyd's* deposition, they do not in any degree impair the plaintiff's right to recover.

The next question relates to the competency of *F. Dickinson*, one of the makers of the note, as a witness for the defendant in the trial of this action. He was directly interested in the event of this suit, because a verdict against the defendant might be used as evidence in an action by the latter against him. If there has been any uncertainty or diversity in the practice of other courts, there has been none in this; and such witnesses have always been released by the defendant before they were examined by him. In the present case, however, the point rests on much stronger ground. According to the defendant's statement, this was an accommodation bill, which he endorsed merely as a surety for the makers; and he offers the principal, for whose debt he is sued, to prove that he is not bound to pay it. (*a*)

The case of *Birt* vs. *Kershaw*, which was relied on in the argu-

(*a*) [The mere fact that he was one of the makers of the note did not disqualify the witness. From the authorities, it seems that the witness would have been competent, if the endorsement had not been made for his accommodation. — *Phil. & Am.* 8th. *Lond.* ed 127. — *Charrington* vs. *Milner*, *Peake's C.* 6. — *Verning* vs. *Shuttleworth*, *Bayley on Bills*, 5th ed. 536. — But this rendered him incompetent. — *Jones* vs. *Brooke*, 4 *Taunt.* 464. — *Edmunds* vs. *Lowe*, 8 *B. & Cr.* 407. — *Bottomley* vs. *Wilson*, 3 *Starkie*, 148. — *Hardwicke* vs. *Blanchard*, *Gow.* 113. — *Phil. & Am.* 104—125 — *Maundrell* vs. *Kennett*, 1 *Camp.* 408. — *Hall* vs. *Cecil*, 6 *Bingh.* 181. — *Townsend* vs. *Downing*, 14 *East*, 565. — *Greely* vs. *Dow*, 2 *Met.* 176. — ED.]

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ment, is wholly unlike this. There the witness was an endorser *after* the defendant, who called him; and was of course not liable, in any event, to an action by the defendant, in consequence of his being a party to the bill. His supposed interest arose entirely from his having received money of the defendant to pay the debt to the plaintiff; and he was considered, in this respect, as on the footing of any other agent under like circumstances, who is at all events liable to one or other of the parties in the suit, and who therefore stands indifferent between them.

* As to the next point, I was by no means satisfied that [*313] the usury, if proved according to the statement of the defendant, would avoid this note. The usury, as alleged, was wholly in other negotiations; and the note was held as a pledge, or rather it was to be applied in discharge of the eventual balance of those negotiations. Now, if any other chattel had been delivered in like manner, and *Lloyd* had sold it to the plaintiff, and applied the proceeds of the sale towards the discharge of that balance, it would not be contended that the title of the purchaser could be impeached by reason of usury between the vendor and the former owner of the chattel. But, without determining that question, it is clear that the accounts current, which were offered by the defendant, could not be used by him for any purpose. They were not among the *res gestæ* at the time of the negotiation of this note; and therefore they stand on the same footing with any other accounts between *Lloyd* and the *Dickinsons*. They could not be used by the defendant to impeach or contradict the testimony of *Lloyd*, because he was a witness produced by the defendant himself. (*b*)

New trial ordered

(*b*) [It is clearly settled that a party may prove, by other evidence, the truth as to a material fact relevant to the issue in a cause, although it may collaterally affect the credit of his own witness. — *Phil. & Am.* 8th ed. p. 902, 903, 904. — *Bull. N. P.* 297. — *Lowe* vs. *Joliffe*, 1 *Bl.* 365. — *Pike* vs. *Badnaring*, 2 *Stra.* 1096, a. — *Alexander* vs *Gibson*, 2 *Camp.* 556. — *Richardson* vs. *Allan*, 2 *Stark. N. P.* 334. — *Ewer* vs. *Ambrose*, 3 *B. & Cr.* 423. — *Bradley* vs. *Richards*, 8 *Bingh.* 57. — *Friedlander* vs. *The Royal Exchange Assurance Company*, 4 *B. & Ad.* 193. — *Wright* vs. *Beckett*, 1 *M. & R, N. P. C.* 429. — But in this case the substantial ground of objection was that the proof offered was not substantive evidence of the fact which it was offered to prove. — *Ewer* vs. *Ambrose*, 3 *B. & Cr.* 746. — ED.]

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JOHN CHANDLER AND OTHERS *versus* BERIAH W. SMITH.

A bond given by the plaintiffs in replevin was holden sufficient, although bearing date the day after the service of the writ, although executed by two only of four plaintiffs, and although conditioned for a return of the chattels in like good order *as when replevied*, instead of *as when taken*.

REPLEVIN of a horse, attached by the defendant, a deputy sheriff of the county of *Franklin*. Issue was joined in the Common Pleas upon the property in the horse, and found for the plaintiffs. The action being brought by appeal into this Court at the last May term at *Greenfield*, a motion was made by the defendant to dismiss the suit, on the ground that the bond given by the plaintiffs [*314] was not sufficient, within the provisions of * the statute. (1) The cause stood over to this term, by direction of the judge, for the consideration of the said motion by the whole Court.

[There were four plaintiffs, and the bond was executed by two of them only, and by two sureties. The bond was dated the 29th of October, 1816, and the writ, as appeared by the constable's return, was served on the 28th of that month; and it was conditioned, among other things, to return the horse in like good order and condition as when *replevied*, in case such should be the final judgment in the action.]

Mills, in support of the motion, contended that the writ was conditional, and, until the condition was complied with, the officer had no authority to serve it, and could not justify under it. The condition is that the plaintiff, and, of course, where more than one, that the plaintiffs, shall give bond, &c., to return and restore the chattels in like good order and condition as when taken, &c. (2)

That the defendant may avail himself of this matter by motion, is laid down by the Court in the case of *Cady* vs. *Eggleston & Al.* (3)

Alvord, for the plaintiffs. The defendant has the personal security of the plaintiffs, without any bond. The object of the statute is that sureties shall be furnished; and those in this case were abundantly sufficient. Where, as in the present case, the owners of chattels wrongfully seized live in distant sections of the country, it would be very absurd that no security, but that of every one of them personally, in addition to sufficient sureties, should entitle them to reclaim their property.

(1) *Stat.* 1789, c. 25, § 4.
(2) 3 *Mass. Rep.* 310, *Moors* vs. *Parker & Al.* — 5 *Mass. Rep.* 314, *Morse* vs *Hodsdon & Al.*
(3) 11 *Mass. Rep.* 285.

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The mistake in the date of the bond is an immaterial circumstance, and can have no operation.

The slight difference in the phraseology of the bond from that used in the statute, will not be considered a sufficient ground to support the motion, especially as, if the words are not synonymous, all that the plaintiffs should be holden to do is to return the chattels in as * good condition as when delivered to [* 315] them, not as when taken by the defendant from them.

But the defendant comes too late with his motion. This can be considered, at most, as an irregularity in the process, but would not support a writ of error on the judgment.

If, however, the Court should be of opinion that the grounds of the motion are sufficient, and that it was seasonably made, the defendant moves for leave to file a new bond. (4)

Per Curiam. By the return of the officer upon the writ, it appears that he took a bond from the plaintiffs at the time he replevied the property. The date of the bond is immaterial, if the fact in the return is true; because the bond may have been dated on a different day from the date of the return by mistake merely. If the truth of the fact can be questioned at all, it can only be on an issue to the country, upon a plea in abatement. The defendant, having answered fully to the suit, thereby admitting a proper service of the writ, cannot now avail himself of the variance in the date between the service and the bond, upon motion, but must be considered to have waived this exception.

The other grounds of the motion we think wholly untenable, as the spirit and intent of the statute, in requiring security, have been fully attained.

Motion overruled.

(4) *Com. Dig.*, title *Pleader*, 3, K, 5, cites *Mar.* 46. — *Noy*, 156.

RUFUS SAXTON *versus* SETH NIMMS AND OTHERS

The return of the freeholder, upon a warrant from the selectmen for warning a meeting of the inhabitants of a school district, that he had warned them according to law, was held to be conclusive, in an action by one of the inhabitants against the assessors, for assessing a tax on him which had been voted at such meeting.

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SAXTON *vs.* NIMMS & AL.

THIS was an action of *trespass* for taking and carrying away an ox, the property of the plaintiff. The defendants
[*316] * pleaded, in justification, that they were assessors of the town of *Deerfield*, in the county of *Franklin*; that there was a certain school district in that town, the inhabitants and members of which, at a meeting duly warned, voted to raise a certain sum to build a school-house within the said district; that this vote was duly certified to the assessors, who were accordingly requested to assess the amount on all the inhabitants of the district; that the defendants, as such assessors, did so assess it; that the plaintiff was one of the said inhabitants, and was duly assessed his proportion, and refused to pay; whereupon the said ox was distrained and sold by the collector, by virtue of the warrant of the assessors. The plaintiff, in his replication, traversed that the said meeting of the said inhabitants of the school district was duly warned, and the said money lawfully voted, as set forth in the plea. To this there was a rejoinder, tendering an issue on the traverse; which issue was joined.

On the trial of this issue, before *Jackson*, J., at the last May term in *Greenfield*, several different questions arose; but the point on which the verdict was given was the warning of the inhabitants of the said school district, for the meeting at which the money was voted. As to this, it appeared that the warrant of the selectmen for calling said meeting was issued, as prescribed by the statute, to one of the persons who had signed the petition or application for the meeting. This person, by a return endorsed on the warrant, and dated the 3d of December, 1812, had certified that he had warned all the said inhabitants as the law directs. (1)

The meeting was to be held on the 10th of said December; and the warning, if given on or before the said 3d day, would have been seasonable and legal.

The plaintiff offered to prove that many of the said inhabitants, if warned at all, were not warned until the 4th day of that month; which, according to the provisions of the statute, was too late for the said meeting on the 10th.

[*317] * The defendants objected to the admission of such evidence, contending that the said return of the person who executed the warrant was conclusive for all the purposes of this trial. This objection was overruled.

The plaintiff then produced and examined several witnesses, including the said person who executed the warrant, who testified to facts, tending to prove that the said person who executed the said

(1) See *Stat.* 1799, c. 66.

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warrant had misapprehended the provisions of the law, and thought the seven days' notice, required by the said statute, included both the day of the warning and the day of the meeting; and that he accordingly notified about one third of the inhabitants of the district on the 4th of December. But there was no attempt, on either side, to prove who were the individuals thus warned too late. He did not attempt to conceal this fact when making out his return on the warrant, which he did when the people were assembled, but before the meeting was opened. He conversed on the subject with several of the inhabitants, and after consulting with them, made out his return in the form above mentioned. The meeting was very fully attended, and it did not appear that any of those who were not seasonably warned were absent.

The three defendants were members of the district, and were all present at the meeting, and one of them had signed the application to the selectmen for the meeting. The plaintiff was present at the meeting, and was dissatisfied with the proceedings of the majority; and he openly declared that he would not pay any part of the money so voted to be raised, unless compelled by law. But it did not appear that he, at that time, objected on account of the warning being too late.

The judge instructed the jury that, if the warning was not completed until the 4th of December, and if several of the inhabitants were warned on that day, as testified by some of the witnesses, the warning was insufficient, and the meeting was illegal; and that, if they were satisfied of that fact, they should find a verdict *for the plaintiff. The judge observed, further, [*318] to the jury, that, if the defendants could show that all the persons who were warned too late did, nevertheless, attend the meeting and vote or act therein, this might alter the case. But as the defendants did not undertake to prove this fact, it was not necessary to decide what would be the effect of it; and that it was not necessary for the plaintiff to prove that any individuals were prevented by that circumstance from attending the meeting.

A verdict was returned for the plaintiff; and the defendants moved for a new trial, on account of the admission of the said evidence to contradict the return endorsed on the warrant, and also on account of the said directions of the judge to the jury.

Bliss and *Mills*, for the defendants, contended that the return of the person to whom the selectmen addressed their warrant was conclusive, so far as it had any relation to the present action. If the return is false, and the plaintiff is injuriously affected by it, he has his remedy by action against the person guilty. (2) He is no

(2) 4 *Mass. Rep.* 478, *Clayton* vs. *Chesar*.

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party to the suit, and it would be a violation of principle to pass upon his conduct, without giving him an opportunity of being heard in his defence. (3)

The defendants were peremptorily obliged, by the certificate of the clerk of the district that the money had been voted to assess the same. They had no means of knowing any supposed irregularities, either in the warrant for calling the meeting, in the execution of that warrant, or in the proceedings of the meeting held pursuant to it.

The same principles are applicable here as to meetings of towns. Those meetings are to be warned by the constable or other person appointed by the selectmen. But was it ever known that the doings of a town were held void, and a tax assessed pursuant to a vote of the town to raise money for an authorized object adjudged illegal, on the ground that some one or more of the inhabitants had not been warned, when the return was in itself sufficient?

[*319] *If evidence of any kind was legally admissible, to contradict the return, it is humbly believed that the testimony of the person making the return, falsifying his own certificate, was improperly admitted, to charge the defendants for an act done by them on the faith of that very return.

Strong, for the plaintiff. The defendants can justify only under the vote of the inhabitants of the district. If that vote was not authorized by law, their assumed authority was void, and they are liable in trespass. (4) If the meeting was not duly warned, the proceedings at it were void, and no justification or excuse can be set up by the defendants under those proceedings. If one of the persons entitled by law to act in such meeting was omitted to be duly warned, the act and doings of those assembled were without authority; for if the omission to warn one person would not avoid the proceedings, neither would the omission of a greater number. (5)

The certificate of the freeholder, to whom the selectmen directed their warrant, is not of the nature of the return of process by a public officer. He is not sworn, nor does the statute require a return to be made by him. The rule, that the return of the sheriff is not to be contradicted, is founded on reasons of public policy, which do not apply to this case. There is nothing in the brief authority thus conferred on the individual freeholder which requires that his certificate, under the circumstances shown to exist in this case, should be held conclusive.

(3) 9 *Mass. Rep.* 231, *Fowler* vs. *Bebee & Al.* — *Com. Dig.*, *Return*, G.
(4) 11 *Mass. Rep.* 220, *Agry* vs. *Young & Al.* — 13 *Mass. Rep.* 272, *Stetson* vs *Kempton & Al.* (5) *Strange*, 1051

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Towns stand on quite different grounds from these small *quasi* corporations. They are of larger extent, have more various and important duties and responsibilities. Their constables are chosen by the whole body, are known officers of the law, and are sworn to the faithful discharge of their duty. The proceedings of towns are of a public nature, and an interference with them for slight causes might be very mischievous. The quiet of the government might be disturbed, and its financial operations greatly impeded, by a construction of law, which, in other cases, common justice * and the security of the citizen might warrant and [* **320**] require.

PARKER, C. J. The statute which authorizes the raising and assessing taxes in school districts, having required that the meetings for such purposes shall be warned at least seven days before they are held, and that any vote to raise money, for the purpose of erecting or repairing a school-house, passed by a majority of the inhabitants present at a district meeting warned and held as aforesaid, shall be obligatory on the inhabitants, to be assessed, levied, and collected, as prescribed in the act, it would seem to follow, as the manifest intent of the legislature, that any vote to raise money, at a meeting otherwise warned and held, should not be obligatory.

If, then, it appeared, by legal evidence, in the case before us, that the meeting at which the money was raised, for his proportion of which the plaintiff was assessed, and his property distrained, was warned less than seven days before the meeting was held, the vote and all the subsequent proceedings would be void, and the defendants would be trespassers, for having authorized an unlawful seizure of the plaintiff's property. By the return of the person to whom the warrant for calling the meeting was directed, it appears that full seven days' warning was given; but by the evidence at the trial it was satisfactorily proved to the jury that some of the inhabitants of the district had less than seven days' notice.

The case, then, turns altogether upon the competency of the evidence given to impeach the return upon the warrant. And in this case against the assessors, acting compulsorily under the law, which requires them to assess such taxes as shall be voted, we think such evidence ought not to have been admitted. They have a right to presume that the meeting at which the money was raised was lawfully warned; for by the records it appeared to be so. They could not otherwise call the fact in question, than by examining witnesses * as to the truth of the return, which they [* **321**] were under no obligation to do.

It would tend to confusion in town affairs, if assessors, instead of determining their official duty by repairing to the records, should

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first be obliged to ascertain, beyond all possible doubt, whether any one inhabitant had been omitted in the warning, or had not been warned quite seven days before the meeting. Indeed, they could never exercise their authority with safety, until they had made a personal application to every inhabitant, and obtained his confession that he was warned in season; and thus the affairs of the district would be brought to a stand. For it would be in the power of any individual, by refusing to admit that he was warned, to excite such doubts as would prevent the execution of their duty.

There are difficulties also on the other side; as the person to whom the warrant is committed may, by neglecting or designedly omitting his duty, produce a partial vote, and then by his return screen the assessors from an action. But we apprehend such iniquity will rarely happen; and when it does, there is no doubt an indictment will lie against the person committing such an offence, for a false return; for he will be viewed *quasi* an officer, and bound to act faithfully in his assumed duty.

What remedy there may be for the inhabitants, who may be held to pay an illegal tax, is a question of more difficulty. There is no doubt an action would lie against the person making the false return; and whatever damages could be proved would be recovered; and although it might be difficult to measure them, yet, in case of a wanton omission of duty, there would be at least an indemnity. (*a*)

New trial granted.

(*a*) [*Thayer* vs. *Stearns*, 1 *Pick.* 109. — 1 *Stark. Ev.* 2d *Lond.* ed. 204. — 2 *Stark.* 913, *Niles* vs. *Hancock*, 3 *Met.* 568. — ED.]

[*322]

*THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE SPRINGFIELD BANK *versus* SAMUEL F. MERRICK AND OTHERS.

The bills or notes of banks not incorporated by this commonwealth were prohibited by law to be received, or in any way negotiated, by the banking corporations within the commonwealth under a heavy penalty. It was holden, that a promissory note, payable in such bills to a banking corporation, made while the statute was in force, was void; and that no action could be maintained upon it by the promisees, after the statute was repealed.

ASSUMPSIT on a promissory note, given by the defendants to the plaintiff, dated December 14, 1815, for the sum of 300 dollars, payable in sixty days.

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At the trial of the action, which was had upon the general issue, before *Jackson*, J., at the last April term at *Springfield*, in the county of *Hampden*, the note appeared to have been written in the usual form of a cash note, and it was subscribed by two attesting witnesses. It was presented at the bank, to be discounted, by the said *Merrick*, who was the principal debtor, the other two defendants having signed the same as sureties for him. The words "*in facilities*" were afterwards written on the left side of the note, under the names of the subscribing witnesses. The word "facilities" was understood at that time to mean certain notes of some of the banks in the state of *Connecticut*, which were made payable in two years after the close of the late war.

The time and manner of writing those words upon the note were as follows: The plaintiffs, in discounting notes, sometimes paid the amount in the facilities above described, or in bills of some of the banks in the state of *New York*; and in such cases agreed to receive payment of the note, when due, in the like kind of bills. The officers of the bank, when discounting a note in that manner, usually wrote the words "in facilities" on the face of the note. The note in question was agreed to be discounted for such facilities, or for bills of some of the *New York* banks, which were at that time of about equal value; and the person who received the note * from the said *Merrick*, and paid him [* 323] therefor at the bank, wrote the said words on the note in his presence. This person was not the cashier of the bank, but was often employed by the cashier to assist him, and sometimes did the duties of that office, in the absence of the cashier; in which cases he often received instructions from the directors, as to the discharge of his duty. He had general instructions from the directors to write the words above mentioned on notes when they were to be paid in facilities, but did not remember that he had any particular instructions respecting this note. He was never formally appointed cashier of the bank, nor had he given any security to the plaintiffs for the faithful discharge of the duties of that office.

The defendants contended that the note was illegal and void, as being contrary to the provisions of the statute of 1809, c. 38, § 2; and if not void, they contended that, by force of the memorandum written on it as above mentioned, it was payable in such bills of the *Connecticut* banks which were of less value than specie at the time when it became due.

There had been sundry payments made and endorsed on the note; and the balance due at the time of the trial, with interest, if it was payable in such "facilities," amounted to 145 dollars 9 cents; the amount due, if it was payable in specie, was 157 dollars 70 cents

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A verdict was taken for the latter sum, subject to the opinion of the Court, whether the plaintiffs were entitled to recover in this action; and if so, for what sum; and the verdict was to be set aside in whole or in part, and altered or affirmed, according to the opinion of the Court upon the foregoing facts.

Mills and *Morris*, for the defendants, argued that the words "*in facilities*," thus placed upon the note, must have their effect in construing the contract, and must be understood to intend that the note was to be payable in facilities; so that, if any thing should be recoverable in this action, it must be the smaller sum only. (1)

[*324] * But they insisted that the note was illegal and void by the statute before referred to; by the second section of which it is enacted, that, after the 1st day of January, 1810, "The bank bills, or notes of any banking company not incorporated by this commonwealth, other than the bank bills of the *United States* Bank and its branches, shall not be received as a deposit, or in any other way be negotiated, loaned, or passed in payment, by any of the banking corporations within this commonwealth, under the penalty of one thousand dollars for each offence, to be recovered by action of debt in any court proper to try the same, to the use of the person who shall sue therefor." And although this provision of the statute has been since repealed, (2) and thus the plaintiffs may escape the penalty, since there is no saving clause in the repealing act, the contract was void in its origin, and the repeal of the law will not give it validity.

Bliss, for the plaintiffs. The statute relied on to avoid this contract was repealed before the present action was commenced; and while it continued in force, its whole effect was to inflict a penalty on those corporations who should do a certain act, which the legislature considered as inconsistent with the financial policy of the country. It was not intended to aid fraudulent debtors, by declaring their contracts void. (3)

However the transaction disclosed in this case might have subjected the plaintiffs to the penalty inflicted by the statute, while that was in force, it does not lie in the mouth of the defendants to avoid their contract for this cause, for which, as between them and the plaintiffs, the transaction was in every respect fair. (4)

(1) 4 *Mass. Rep.* 245, *Jones* vs. *Fales*.
(2) *Stat.* 1816, c. 43.
(3) 6 *D. & E.* 723, *Camden* vs. *Anderson*. — 1 *B. & P.* 277, S. C. - 11 *East*, 190. — *Johnson & Al.* vs. *Hudson*, *Ibid.* 299.
(4) 9 *Mass. Rep.* 423, *Little* vs. *Obrien*.

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PARKER, C. J. The writing which was in this case submitted to the jury, as evidence of the promise declared upon, must, with the accompanying testimony, be taken to be an engagement to pay *facilities*, to the amount of three hundred dollars nominal value, for that was the consideration of the note; and it was the understanding of the parties that the contract should have that effect. That evidence tending to give this * character [* **325**] to the promise was legally admitted, is proved by the case of *Jones* vs. *Fales*, cited in the argument; in which case the words *foreign bills*, at the foot of a note otherwise negotiable, were considered capable of being made, by evidence of the intent of the parties, an essential part of the contract, so as to defeat its negotiability.

There can be no question but this memorandum, under the circumstances proved, must be considered as the act of the directors of the bank, and so binding on the stockholders. The verdict, then, ought to stand for the lesser sum, which is understood to be the value of the note, as payable in facilities, unless it shall be wholly set aside, on the ground that the contract is void, as against law.

By the statute of 1809, c. 38, it was made unlawful for any bank to loan, negotiate, receive in payment, or otherwise to deal in, the bank bills of other states; and a heavy penalty was inflicted upon any who should transgress this law. The note sued in this action was made and received during the existence of this law, and in direct violation of its provisions. Can it, then, be recovered? If it can, the judiciary power may, to a very great extent, defeat the manifest intent of the legislature. For although the penalty may be sued for and recovered, yet circulation may be given to bills received upon such illegal contracts, and the penalty may never be exacted.

The subsequent repeal of the act can have no effect upon a contract made while it was in force. As well might a contract, made for the purpose of trade with an enemy during a war, be purged of its illegality by the return of peace.

The case of *Camden* vs. *Anderson* does not prove the point it was cited to support. It would seem rather, from the provisions of the statute commented upon in that case, that, when a penal statute was repealed, it might still be pleaded against any contract made in contravention of it, unless in the repealing act provision was made to the contrary.

* The case of *Little* vs. *Obrien* is wholly different [* **326**] from the case at bar. The defence against the note in

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that case was, substantially, that the corporation had no authority to receive notes for stock. Such notes were not declared to be illegal, nor was there any penalty for taking them imposed by the act.

The verdict is set aside, and the plaintiffs must be called. (*a*)

Plaintiffs nonsuit.

(*a*) [*Russell* vs. *Degrand*, 15 *Mass. Rep.* 39. — *Wheeler* vs. *Russell*, 17 *Mass. Rep.* 258. — *Dwight* vs. *Brewster*, 1 *Pick.* 55. — *Coombs* vs. *Emery*, 2 *Shep.* 404. — *Seidenbender* vs. *Charles*, 4 *S. & R.* 159. — *Sharp* vs. *Tease*, 4 *Hals.* 352. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WORCESTER, SEPTEMBER TERM, 1817, AT WORCESTER.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES.
HON. CHARLES JACKSON, }

EPHRAIM MOWRY *versus* SAMUEL ADAMS.

When the administrator of a surety pays the debt, he may maintain an action in his own name against the principal for indemnity; and the amount recovered by him will be assets in his hands.

ASSUMPSIT on a promissory note, dated the 6th of November, 1812, made by the defendant to *Paul Boyden*, or order, for 120 dollars, payable in nine months, with interest, and endorsed by said *Boyden*; also counts for money had and received, and for money laid out and expended. The plaintiff, having filled up the endorsement to the bearer, avers that he is the bearer for a valuable consideration.

It appeared in evidence, at a trial had upon the general issue, April term, 1816, before *Putnam*, J., that *P. Boyden* was desirous of borrowing 120 dollars of one *Roswell Warner*, that the defendant gave his note to said *Boyden* for his accommodation, and that

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Warner lent the money, and received the note endorsed in blank by *Boyden*. At the same time, *Boyden* gave his note to
[*328] the defendant for the same sum, payable to him or * his order at the same time, as collateral security; which was not to be paid, unless the defendant should be obliged to pay the accommodation note he had given to *Boyden*.

It was proved that the defendant sold the last-mentioned note, which *Boyden* had given him as collateral security, to *Warner*, and received the money for it, before it became due.

Warner thus held both notes. *P. Boyden* died; and the plaintiff is administrator of his estate; and he paid the amount of both the notes to *Warner*.

If, upon this evidence, it should be the opinion of the whole Court that the plaintiff could maintain this action in his own name against the defendant, judgment was to be entered upon the verdict, which was taken for the plaintiff; otherwise he was to become nonsuit.

Lincoln for the defendant.

Newton for the plaintiff.

PARKER, C. J. The plaintiff, *Mowry*, has brought this action in his own name; and the question is, whether he can maintain it, or whether he ought not to have sued as administrator of *Boyden*.

With respect to the count on the note, he could not recover, either in his own right, or as administrator, because the note was given by *Adams* for the use and accommodation of *Boyden*, the intestate, and ought to have been paid by him, he having received the money from *Warner*. Besides, he derives no title to it from having paid and taken up the note, with the blank endorsement of *Boyden*; for the note was not payable to bearer, as he has declared, but to order; and he has not averred any assignment of it to himself.

With respect to the other counts, as the defendant was guilty of a breach of faith in endorsing the second note and receiving the money for it, he never having given any valuable consideration to *Boyden* for the note, he is conscientiously, as well as legally, bound to pay the amount to some one.

The question is, whether he became indebted to the
[*329] *plaintiff, or to the estate of *Boyden*; and this depends upon the time and manner of his becoming liable. The mere taking up the money from *Warner* did not create the debt; for *Boyden* was not prejudiced, until he should be called upon to pay, nor would he have had a right of action, until so called upon. He died without paying, and there was therefore no promise to him. His estate was, however, liable, and the adminis-

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trator, if called upon, was obliged to pay. The debt of *Adams* accrued when *Mowry* paid the money; an implied promise then arising to repay, it being, in fact, the debt of *Adams* for which *Mowry* was surety, and which was paid by *Mowry* to the use of *Adams*.

But the promise could not accrue to *Boyden*, he being dead. It was therefore a promise to the administrator. Now, it is settled that, when a contract is made with an executor or administrator personally, after the death of the testator or intestate, or where money is received by the person sued after the death, in such cases, the executor or administrator may sue either in his own name, or as executor or administrator. By suing in his own name, he becomes answerable to the estate for the amount recovered, and it is an implied acknowledgment of assets to that amount in his hands.

The present is a case of that sort. The plaintiff takes money of the estate to pay a debt, for which the estate is answerable; he sues the principal debtor in his own name; he is chargeable with the amount of the debt as assets; and he may recover the amount from the debtor in his own name. (1)

Judgment on the verdict.

(1) 6 *Mod.* 92, 181. — 2 *D. & E.* 477. — *Willes's Rep.* 103. — 1 *Com. on Contracts*, 526.

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* COMMONWEALTH *versus* SETH CALDWELL.

In an indictment for refusing to answer a tithingman on the Lord's day, it is not necessary to allege that the tithingman was sworn into his office; nor that he had any wand or badge of office; nor that he was known to the defendant to be a tithingman.

THE defendant was indicted, under the statute of 1791, c. 58, § 10, in the Circuit Court of Common Pleas, December term, 1815, for refusing to give answer to one *Joseph Stone*, a tithingman of *Shrewsbury*, on the 30th day of April, 1815, the same being Lord's day. Being convicted on trial in the Common Pleas, he appealed to this Court; and at April term, 1816, retracting his former plea, he entered a *nolo contendere*, and then moved in arrest of judgment, stating the following causes:—

1. That it is nowhere alleged, in the indictment, that the said *Joseph Stone* had, at any time before the said 30th day of April,

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taken the oath prescribed and required by law to be taken by persons who are chosen tithingmen within the commonwealth.

2. That it is nowhere alleged, in said indictment, that the said *Joseph Stone*, at the time of demanding of the said *Seth* the cause of his travelling on the said day, had in his possession any badge of his said office, or that he exhibited any sign or token by which the said *Seth* could be informed that he, the said *Joseph*, was then and there a tithingman for said town of *Shrewsbury*, and was then and there engaged in executing the duties of the said office.

3. That it is nowhere alleged, in said indictment, that the said *Seth*, at the time he refused to answer the said *Stone*, had any knowledge, or any reason to believe, that the said *Stone* was then and there a tithingman for said town of *Shrewsbury*.

Lincoln and *L. Bigelow*, for the defendant. Whatever is necessary to be proved in support of the indictment should be substantially alleged therein. Unless the tithingman was legally sworn to the discharge of the duties of the office, he had no right to make the inquiry of the defendant, and the latter was under no legal obligation to answer him. The indictment alleges only that he was duly chosen. (1)

[*331] *It was material to allege that the defendant knew *Stone* to be a tithingman. The refusing to answer another person could not be an offence against law. When one does an act *malum in se*, he acts at his peril; but, where the act is not unlawful in itself, it is necessary to allege a *scienter*, or a criminal intent. (2) If it is not essential to the offence charged in this indictment that the party knows the inquirer to be a tithingman, every traveller must, at his peril, stop and answer to the questions put to him by any impertinent man he meets. By the provincial act of 10 *Will.* 3, c. 8, every tithingman is required to have a staff of a certain description as a badge of his office; and this provision of law has never been repealed to the present day.

The conclusion of this indictment, as it charges an act made reprehensible only by statute, should have been, *against the form of the statute in such case made and provided.* This is an indispensable requisite. (3) The conclusion in this case is "*against the peace and the statute.*"

(1) 1 *Chitty on Pleading*, 216. — 2 *Burr.* 1127, *Rex* vs. *Wheatly.* — *Com. Dig.*, *Pleader*, C, 50.

(2) 1 *Chitty*, 376. — 5 *Burr.* 2667, *Rex* vs. *Woodfall.* — 6 *East*, 473, *Rex* vs. *Phillips.* — *Com. Dig.*, *Action on the Case for Deceit*, F, 3; *Justices*, M, 12; *Indictment*, G, 1, 3. — 1 *East*, *C. L.*, *Homicide*, § 81, 82, 83.

(3) 7 *Mass. Rep.* 9, *Commonwealth* vs. *Springfield.* — *Bac. Abr.*, *Indictment*, H, cites *Hawk. P. C.* c. 25, § 126. — 11 *Mass. Rep.* 279, *Commonwealth* vs. *Stockbridge.* — 2 *East*, 333, *Lee* vs. *Clarke.*

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It is humbly insisted that the provision of the act upon which this indictment is framed, is an attempt at legislation beyond the constitutional limits assigned to the government by the declaration of rights. The twelfth article of that declaration provides that "no subject shall be compelled to accuse or furnish evidence against himself." Under the statute in question, if one is travelling unnecessarily, and is inquired of, if he speak the truth, he must accuse and furnish evidence against himself, and this to a person who is bound by his oath of office to prosecute the offender, and to whom a part of the penalty imposed is to enure on conviction; if he answer untruly, that he is necessarily travelling, another penalty attaches; and if he is silent, he is still subject to a distinct penalty.

White, (*County Attorney*,) for the commonwealth. The twelfth article of the declaration of rights refers solely to judicial proceedings. The provision of the statute on which this prosecution is grounded is intended for the convenience and ease of travellers. If * they give a sufficient reason for their [*332] travelling, they are permitted to pass without further animadversion. Nothing is required by the law but that courtesy which ought always to prevail between the citizens and the officers of the law. Long since the declaration of rights was adopted and established, wardens had authority to arrest and detain travellers on the Lord's day. The present provision is, then, a great relaxation, and may justly be considered as very lenient.

As to the want of an allegation that the tithingman was sworn, the allegation that he was a tithingman includes his election and oath of office; and "being a tithingman," is tantamount to a direct allegation that he was such. (4)

As to the want of the allegation respecting the officer's staff, the dimensions, color, and ornaments of which are prescribed with so much minuteness in the provincial act, it is to be noted that all the provisions of that act relating to tithingmen, except this respecting the staff, are reënacted by the revised statute of 1786, c. 68, whereby the legislature have plainly shown that they no longer require the exhibition of the badge; which, indeed, in practice had disappeared long before the period of that statute.

As to the want of a *scienter* alleged, it is answered, that the indictment charges the offence in the very words of the statute; which has always been considered the best, as well as the safest, way of charging crimes created by statute.

The conclusion "against the statute," is more forcible than *against the form of the statute;* as it avers the offence to have been committed against both the substance and form of the statute.

(4) 2 *Burr.* 832, *Rex vs. Boyall.*

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PARKER, C. J. By the statute of 1791, c. 58, tithingmen are authorized and required to examine such as they find travelling on the Lord's day, and whom they have reason to suspect of travelling unnecessarily; and if such travellers refuse to give their names, or to answer such inquiries as are made touching the cause of their travelling, they are subjected to a penalty.

[*333] *The defendant has been indicted and convicted for not answering such questions as were put to him by the tithingman who caused the prosecution; and a motion is now made to arrest the judgment, on account of the insufficiency of the indictment.

The first objection is, that it is not alleged in the indictment that the tithingman was sworn into office. This is not necessary. To constitute a tithingman, it is necessary that he should be sworn; and to allege that he is a tithingman, involves the allegation that he is sworn.

The next objection is, that it is not alleged that the tithingman had any wand or badge of office. This, although necessary under a former law, is not required by the present statute, and therefore need not be alleged.

The third objection is, that it is not averred that the defendant knew *Stone* to be a tithingman. But this is not necessary, he being a public officer. The indictment in this particular follows the statute. The *scienter* is not a constituent part of the offence, as in possessing counterfeit bank notes. If the defendant did not know him to be an officer, this would be good defence by the common law, and need not be negatived in the indictment.

Motion in arrest overruled

SAMUEL AUSTIN *versus* ISAIAH THOMAS.

A conveyance of parsonage land from the parish to the minister in fee was holden to be a void act.

THIS was a writ of entry, in which the demandant, as minister of the first parish in the town of *Worcester*, in right of his parish, demands possession of a tract of land described in his writ; in which he counts upon the seisin of his predecessor, *Thaddeus Maccarty*, within thirty years before the 30th of April, 1814, the date of the writ; alleging an entry by *Thaddeus Maccarty*, Jun., and *Wil.*

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liam G. Maccarty, by abatement within that time, under whom the tenant claims.

* The demandant, to establish his title to the de- [* **334**]
manded premises, produced in evidence a copy of a vote of the inhabitants of the town of *Worcester*, in legal town meeting held on the 23d of March, 1746–7, they then constituting one parish, to raise the sum of £300, and to appoint a committee to make sale of 100 acres of the ministerial lands in the town, for the purpose of purchasing a parsonage estate with the sum so raised and the proceeds of said sale; also a resolve of the General Court, passed the 3d of June, 1747, authorizing said sale by the town, provided they should invest the proceeds thereof in real estate for the use of the ministry; also another vote of the inhabitants of said town, in legal town meeting, September 11, 1747, appointing a committee to purchase such a parsonage, agreeably to said resolve and the former vote of the town, and to receive a deed and conveyance of the same, to be given to *John Chandler*, then treasurer of the town, to and for the use of said inhabitants as a parsonage; also a deed from one *Samuel Breck*, dated the 25th of September, 1747, conveying the demanded premises to said *John Chandler*, treasurer, to and for the use of said town as a perpetual parsonage.

The demandant also proved that the Rev. *Thaddeus Maccarty* was, in the year 1747, duly ordained as the minister of said town or parish, and entered into possession of the demanded premises, and continued in possession thereof until the 20th of July, 1784, when he died

It was also proved that, at a legal town meeting, held on the 10th of September, 1764, the said inhabitants appointed a committee to make sale of said parsonage to said *T. Maccarty*, on his indemnifying or releasing the town from all charges and expenses which should be incurred for the repairs made thereon; and that a deed was accordingly made by said committee, in pursuance of said vote, to said *Maccarty*, dated the 4th of March, 1765, wherein they release and sell the same, in behalf of the said town, to said *Maccarty*, to have and to hold the same to him, his heirs and assigns, in fee.

* It was also proved that, on the 13th of November, [* **335**]
1787, the second parish of *Worcester* was duly incorporated; and that, on the 29th of September, 1790, the demandant was duly ordained the minister of the first parish of said town, and regularly inducted into said office.

The tenant read to the jury the last will and testament of the said *T. Maccarty*, empowering his executors, the said *Thaddeus* and *William G.*, to make sale of the demanded premises; and a con-

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veyance thereof by them to the tenant, dated the 13th of October, 1789.

Upon these facts, the tenant contended, at the trial, that the deed of *Samuel Breck* to *John Chandler*, treasurer, was not a grant or donation for the use of the ministry, or to pious and charitable purposes, of the kind contemplated and provided for by the provincial act of 1754; or, if it were, that the release from the town to said *Maccarty* was such a concurrent act of the town or parish and the minister thereof as was equivalent, in law, to an alienation of the same premises by the minister, with the consent of the parish; or that it would operate as a disseisin or discontinuance, so as to bar the demandant's right of action.

The judge, intending to reserve these questions for the consideration of the whole Court, instructed the jury that the said release was not such an act as was equivalent to an alienation of said land by the minister, with the consent of the parish, agreeably to the statute; and that it did not operate by way of disseisin, or otherwise, so as to bar the demandant's right of action; and that the demanded premises had been legally appropriated to pious and charitable purposes, according to the true meaning and intent of the statute in such cases made and provided.

If this direction should be considered as correct by the whole Court, or if, upon the whole facts, the demandant was by law entitled to recover, then judgment was to be entered on
[*336] the verdict, which was returned for *the demandant otherwise the demandant was to become nonsuit.

The cause was argued here, at the last September term, by *Bigelow* and *Burnside* for the demandant, and *Lincoln* for the tenant.

For the demandant, it was said that the lands originally laid out as ministerial lands were, from such location, appropriated to pious and charitable uses; and the demanded premises, being purchased in lieu of those lands, must be considered as so appropriated also by the very purchase. The deed from the town to *Maccarty* could not operate a disseisin, because he continued seised under his former right, which was for his own use during his continuance in office, and of his successors afterwards. In the case of *Weston* vs. *Hunt*, (1) the Court say expressly, that "an alienation of the parsonage by the town, district, precinct, or vestry, is void; for if there be a minister, the fee is in him; or if there be a vacancy, the fee is in abeyance." (2)

(1) 2 *Mass. Rep.* 500.
(2) See, also, *Brown* vs. *Porter*, 10 *Mass. Rep* 93.

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The minister and parish united cannot convey parsonage lands, even by the provincial act of 1754, unless the consideration or proceeds of such sale are appropriated to the same use. A sale for any other object would be fraudulent. It is well known that the legislature never authorize such an alienation, but on the express condition that the proceeds shall be applied in the same manner as the estate to be alienated. But the conveyance by the town to Mr. *Maccarty* was to a use and purpose wholly foreign. It was in consideration of being discharged from certain claims or liabilities, a grant to him and his heirs; and the town or future ministers were to be deprived of all benefit from it.

The deed was wholly inoperative, and Mr. *Maccarty* continued to hold under his elder and better title until his death, in July, 1784. The entry by his executors was an abatement, and being less than thirty years before the commencement of the action, the demandant is within the legal term of limitation. (3) Great and * manifest inconveniences would result from a contrary hypothesis. [* 337]

Lincoln, for the tenant. The conveyance of *Breck* to *Chandle* was but of an estate for life in him, and the *cestui que use* can take no greater estate than the grantee. (4) The deed itself contains nothing which should constitute a gift to pious and charitable uses. On the contrary, it purports only an ordinary sale for a pecuniary consideration. The doings of the town, either before or after its execution, can have no operation on its construction.

As this was but a conveyance to *Chandler* for life, at his death the estate reverted to *Breck* or his heirs. The use to the town, as an ecclesiastical body, could not vest for the statutes of mortmain. Nor would the provincial act of 1754 have made it good, if it had applied to it; for the use was limited to the town.

The conveyance by the committee of the town to *Maccarty* may be considered as the joint act of the minister and the town, within the spirit and intent of the act of 1754. The object of the act plainly was, to prevent a conveyance by one party, to the injury of the other. Here was a concurrent act of both; and it may operate as a conveyance by the town, with the assent of the minister.

The conveyance by *Maccarty's* executors was an alienation with the assent of the town, previously granted through their committee.

But if there has been no alienation, there was clearly a disseisin by the conveyance to *Maccarty* in 1765. The town was then disseised by its own act, or by that of its committee; and the demand-

(3) *Stat.* 1807, c. 74, § 2.
(4) *Bac. Abr., Uses and Trusts.* — *Co. Lit.* 8, *b*, 9, *a.* — *Cro. Car.* 231, 244.

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ant is barred of his right to recover in this action by the statute of 1807, c. 74.

The cause stood continued *nisi* for advisement, and at the last March term in *Suffolk* it was ordered by the Court that judgment be entered on the verdict.

PARKER, C. J. The first question which arises in this case is, whether the land demanded was ever ministerial
[* 338] * land, properly so called, of which the minister for the time being was seised in right of his parish.

This is denied by the counsel for the tenant, because the deed conveying the premises from *Breck* to *Chandler* was made to him as treasurer of the town of *Worcester;* so that the land became the property of the inhabitants of that town, in their civil and corporate capacity, but not as a parish or religious society.

But the motive and intent of the parties to this conveyance are apparent from the deed itself, it being expressly stated that the land was to be appropriated as a parsonage; and this being conformable to the vote of the town authorizing *Chandler* to purchase. At the time of the execution and delivery of this deed, the town of *Worcester* constituted one parish; and it was the usage of all our towns anciently, before they became divided into parishes, to transact their parochial concerns at town meetings; making no difference in the forms of their proceedings, when acting upon those subjects, or upon matters of mere municipal or political concern.

The grant of *Breck* to *Chandler*, who was the appointed agent of the town, was therefore a grant to pious uses; so as to come within the provisions of the provincial act of 1754; and the ministers of the town were entitled to the use of the property, and became seised successively, in right of their parish, which in this instance was the town. And according to other provisions of that act, the substance of which has been reënacted since the adoption of the constitution, (5) this land was unalienable, except by the minister, with the assent of the town or parish over which he was settled.

The next question, then, is, whether the tenant has shown such alienation as comes within the letter or the spirit of the act then in force. Upon the application of the minister, the town voted, in 1764, to grant the premises to him in fee simple, for a certain consideration agreed upon between the parties; and pursuant to that vote, a committee, appointed for the purpose by the
[* 339] * town, in 1765, by deeds released and sold the same to Mr. *Maccarty*, in the manner determined by that vote.

(5) *Stat.* 1785, c. 51.

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Was this an alienation according to the true intent and meaning of the act?

The town had not the fee in them, and therefore could not convey it. The fee was before in the minister, and this act of the town did not enlarge his estate; for no title being in the inhabitants, according to the principles of the act of 1754, as explained in the case of *Weston* vs. *Hunt*, nothing passed by the deed of the town.

This being the case, the subsequent conveyance, attempted by the immediate grantors of the tenant, under the will of their father, who had been the minister to whom the grant of the town was made, must be ineffectual; for their father was seised only during the continuance of his ministerial office, which had ceased before this conveyance was made; and his executors derived no power, under his will, to make a title to this land.

It has been suggested that the vote of the town, on which the deed of the committee was founded, might be considered as the assent of the town within the act; and that a subsequent alienation, made by the minister, might be coupled with this assent, and thus a perfect alienation be made, within the equity of the act.

We should be glad to adopt this reasoning in support of the tenant's title; because we cannot but lament that a religious society should endeavor in this manner to avoid a conveyance, made, as far as appears, fairly by their predecessors; they having received a valuable consideration therefor. But we must administer the law, and leave it to the consciences of those who carry on the suit to estimate the true character of the transaction.

If Mr. *Maccarty* had aliened the premises in his lifetime, with reference to the vote of the town, as expressive of their assent, we do not know but the alienation would have been valid. But his power over the estate ceased with his life; and he could not, if it had been *his intention, communicate an au- [*340] thority to his executors to dispose of them. The deed of the executors, therefore, as it respects the conveyance of title, is void, and the tenant can claim no benefit under it.

The effect of this decision will probably be, that an action upon the covenant to warrant will be brought; and that the estate of the deceased pastor of the first parish will be taken from his innocent heirs, to indemnify the tenant for the loss of a title which this very parish assisted to create, and for which they have once received a valuable, and, in their estimation, an adequate, consideration. But we have no right to regard the consequences of decisions which arise from a necessary application of the law to the facts brought before us.

Judgment on the verdict.

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DANIEL ADAMS, Plaintiff in Error, *versus* JONAS HOWE AND OTHERS.

The statute of 1811, c. 6, entitled "An Act respecting public worship and religious freedom," is not contrary to the declaration of rights.

ERROR to the Circuit Court of Common Pleas, upon a judgment rendered June, 1816, in an action of trespass for taking and carrying away a heifer, the property of the said *Adams*, by the defendants in error.

The judgment in the Common Pleas was rendered in favor of the defendants, upon the following special verdict returned by the jury upon the issue of not guilty, joined between the parties: —

"The jury find that the defendants were the assessors of the town of *Rutland* for the year 1813, duly chosen and sworn; and that, as such, they assessed the plaintiff to the support of the ministry, in the tax bills for that year, the sum of five dollars and fifty five cents; that the plaintiff was an inhabitant of said town, and liable by law to be taxed for the support of the ministry there, and that the said tax was duly and legally assessed, unless,

[* 341] by reason of the facts * hereinafter stated, the plaintiff was legally exempted therefrom; that the defendants committed the said tax bills, with the assessment aforesaid, to *Francis S. Hooker*, collector of taxes for the said town of *Rutland* for the year aforesaid, with a warrant under their hands and seals, authorizing and requiring him to collect the same; that, upon the refusal of the said *Adams* to pay said tax, assessed upon him as aforesaid for the support of the ministry for the said town of *Rutland*, the said *Hooker* made distress upon the property of the said *Adams*, by force and virtue of the said assessors' warrant, and took from the said *Adams* the heifer mentioned in the declaration of the plaintiff's writ; and after advertising and keeping the same, according to the provisions of law in cases of distress for taxes, sold the same at public auction, and from the proceeds satisfied said tax and the incidental charges of the distress and sale.

"And the jury further find, that, before the assessment of said tax, by the assessors of said town of *Rutland*, for the year 1813, *viz.*, on the 18th of January, 1813, the said *Adams* filed in the clerk's office, and with the clerk of said town, a certificate of the following tenor: —

"'We certify that *Daniel Adams* is a member of the religious

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society of the town of *Barre* called *Baptists.* Dated this 12th day of January, A. D. 1813.

Simeon Metcalf,
Elias Chase, } Committee.'

that there then was, and long before that time had existed, a voluntary, unincorporated society of Baptists in said *Barre*, of which the said *Daniel Adams* became a member, by subscribing the articles of association, conformably to the constitution of the said society; that the said *Simeon Metcalf* and *Elias Chase* had been chosen, and were a committee of said society, to certify the membership of such as belonged to it; and that the said *Daniel Adams* had in all respects complied with the provisions of the law of this commonwealth, passed the 11th day of June, 1811, entitled

*'An Act respecting public worship and religious free- [*342]
dom,' as a member of such unincorporated society of Baptists as aforesaid.

"And the jury further find, that the said society of Baptists had no public place of worship; that they had for some time occupied, by permission, a school-house, and subsequently a hall in a private house; that they had no public teacher ordained to their peculiar charge, but had made an engagement with the Rev. *Zenas L. Leonard* to preach to them one Lord's day in a month, the said *Leonard* having been, in the year 1796, ordained as an evangelist, according to the forms of the Baptist church, and having ever after supplied the Baptist church in *Sturbridge*, distant from *Barre* about eighteen miles, upon an engagement to continue during the mutual pleasure of himself and said society, and reserving to himself one Lord's day in a month, to supply destitute societies; that the said *Daniel Adams* usually attended the instructions and preaching of the said *Leonard* at said *Barre*, and the meetings of said society of Baptists there, and contributed his proportion towards defraying the expenses thereof.

"And the jury further find, that the said society of Baptists were a different denomination of Christians from the Congregational society in said *Rutland.*

"If, upon the foregoing facts, the Court are of opinion that the said *Daniel Adams* was legally exempt from taxation to the support of the ministry in the town of *Rutland* for the year 1813, the jury find the defendants guilty, and assess damages for the plaintiff, in the sum of fifteen dollars; but if the Court are of a different opinion, the jury find the defendants not guilty."

The cause was argued here at the last September term, by *Lincoln* for the plaintiff, and *Bigelow* for the defendants.

Lincoln cited and relied on the second and third articles of the

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declaration of rights, and upon the law referred to in the
[*343] special verdict, (1) as, in connection *with the facts found in the case, exempting the plaintiff from all liability in taxation for the support of the ministry in *Rutland;* whence it followed that the act of the defendants, in assessing him, and causing his property to be distrained, was tortious, and wholly without justification.

Bigelow. The constitution having received a solemn judicial construction on this point, in the cases of *Barnes* vs. *The First Parish in Falmouth,* (2) and *Turner* vs. *The Second Precinct in Brookfield,* (3) the real question in the present action is, whether the provisions of the act of June, 1811, respecting public worship and religious freedom, are consistent with the constitution of the commonwealth, and so within the legitimate powers of the legislature.

The second section of the act militates directly with the third article of the declaration of rights. Any number of citizens, associating and giving themselves the name of any one of the thousand sects into which Christendom has been divided, or the name of any of the numerous classes of the followers of *Mahomet,* or even of heathen idolaters, — for in every one of these cases they would be well entitled to the name of a "religious society," — may forever discharge any number of citizens from their obligation to contribute to the support of any public teachers of piety, religion, and morality, or to attend on the public instructions of such teacher.

Such an association can never be compelled to maintain public worship or public instruction, since, unless incorporated, they are unknown to the law, and not subject to indictment or information.

In the present case, the utmost of the provision made by the society, to which the plaintiff claims to belong, extends only to one Sunday in a month; nor is it made necessary, to the obtaining of the certificate, that the party should attend the meetings, rare as they are.

The cause stood continued *nisi* for advisement; and at the last March term at *Boston,* an order passed for reversing the judgment.

[*344] *PARKER, C. J. By the special verdict in this case, it appears that the plaintiff in error was exempted from ministerial taxes, according to the provisions of the *Stat.* 1811, c. 6, he having regularly obtained and filed with the proper officer of the town a certificate of his membership in a Baptist society in the town of *Barre,* and such a society being found to exist. It is true that it also appears that the society of which he was a member

(1) *Stat.* 1811, c. 6 (2) 6 *Mass. Rep.* 401. (3) 7 *Mass. Rep.* 60.

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was not incorporated; and that their minister or teacher was not settled over that society, but only engaged to preach to them one Sabbath in a month, he being, in fact, a stated minister of another society in another town. But these latter facts are immaterial, provided the statute has legal force and validity; for it expressly puts corporate and unincorporated societies upon the same footing, and makes no distinction between such as have an ordained minister specially settled over them, and such as are occasionally taught by preachers who may be ordained at large, or as ministers of other parishes, devoting a part of their labors and services to them.

The true and only question, then, arising in this case is, whether the statute before cited is contrary or repugnant to the principles of the constitution, and so of no binding force upon the Court. And after a careful examination of the declaration of rights prefixed to the constitution, where alone the subject is treated of, we do not find that the legislature is restricted in the manner contended for by the counsel for the defendants in error.

We are well aware of the great inconveniences, and the injury to public morals and religion, and the tendency to destroy all the decency and regularity of public worship, which may result from a general application of the indulgence granted by the legislature, in that statute, to all persons who may choose to associate, and withdraw themselves from the regular and established religious societies in towns and parishes, which, being by law obliged to support public teachers, may thus have their means and power so much diminished *as to render that duty oppressive and [*345] burdensome. But our duty is to give effect to such acts of the legislature as they have the constitutional authority to make, without regarding their evil tendency or inexpediency. Subsequent legislatures may correct the proceedings of their predecessors, which may be found to have been improvident or pernicious. And if a law, however complained of, is suffered to remain unrepealed, the only legal presumption is, that it is the will of the community that such should be the law.

We proceed to show why the statute in question may be considered as constitutional; and to show that there is no decided case which in any manner contravenes the opinion which we feel ourselves bound to adopt; that the judgment of the Circuit Court of Common Pleas is erroneous, and must be reversed.

We must premise, that so much respect is due to any legislative act, solemnly passed, and admitted into the statute-book, that a court of law, which may be called upon to decide its validity, will presume it to be constitutional, until the contrary clearly appears; so that in any case of the kind substantially doubtful, the law would

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have its force. The legislature is, in the first instance, the judge of its own constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it, shall appear, that the judicial power will refuse to execute it. Whenever such a case happens, it is among the most important duties of the judicial power to declare the invalidity of an act so passed.

The act of the legislature now in question is supposed to be unconstitutional, in providing for the exemption of persons from taxation to the support of ministers, or public teachers of piety, religion, and morality, in the towns or parishes within which they may dwell, if they belong to a religious society of a different persuasion, whether that society be incorporated or not. In order to ascertain whether, for this cause, the act is unconstitutional, we [*346] must examine the constitution, to *see whether there is any restriction upon the legislature in this respect.

The framers of the constitution, and the people who adopted it in the articles of the declaration of rights, which respect religion and public worship, undoubtedly intended to secure and establish the orderly and regular preaching of the gospel in towns and parishes, and public incorporated societies; and the decent and suitable maintenance of persons of learning and piety, to be set apart as public teachers of religion and morality. This is obvious from the frequent use of the word *public*, as applicable to worship, and to ministers and teachers.

Another great object was, to secure and establish the most perfect and entire freedom of opinion, as to tenets of religion, and as to the choice of the mode of worship.

It was difficult to establish any fundamental rules upon the subject, and they did not attempt it; but contented themselves with declaring the public sentiment upon the subject, and enjoining upon the legislature the importance of providing, from time to time, such laws as should carry these great objects into effect. It was believed that the future guardians of the moral and religious character of the state, and of the rights of conscience among the people, would be at all times regardful of these important concerns, and would establish such wholesome regulations as would comport with the solemnity of the subject and the true interests of the people.

It is therefore declared, in the third article of the declaration of rights, "That the people have a right to invest their legislature with power to authorize and require, and the legislature shall from time to time authorize and require, the several towns, parishes, precincts, and other bodies corporate and politic, and religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of

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public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily."

* And it is further declared in the same article, "that [*347] the people of this commonwealth have a right to, and do, invest their legislature with authority to enjoin upon all their subjects an attendance upon the instructions of the public teachers aforesaid at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend."

The right of choosing and contracting with their own teachers is, then, declared to belong to the public bodies before mentioned; that the money paid by the subject for the support of public worship shall be applied to the support of a teacher of his own denomination, if there be any one upon whom he attends; and that there shall be no subordination or superiority of one sect or denomination over any other.

Three great objects appear to have been the influential causes of the solemn declaration of the will of the people: 1. To establish, at all events, liberty of conscience and choice of the mode of worship; 2. To assert the right of the state, in its political capacity, to require and enforce the public worship of GOD; 3. To deny the right of establishing any hierarchy, or any power in the state itself, to require conformity to any creed or formulary of worship.

The restrictions upon the legislature are against any exercise of authority which might contravene the rights of conscience or the choice of forms of worship, and against the establishment of any national or state creed, or form of worship, to which those who conscientiously disagreed should be obliged to conform, or suffer any inconvenience from nonconformity. The mode of securing these essential points is left entirely to the legislature, and confidence was reposed in them to maintain them by equal and wholesome laws.

That part of the declaration which enjoins it upon the legislature to exact the support of religious institutions, and attendance upon public worship, is merely directory. If no law had been passed pursuant to it, there could be no penalty upon the citizen for not obeying the clear expression of the public will; nor is * there any way of coercing a legislature to carry into [*348] effect these important requisitions. So the mode, also, of executing the will of the people, in this particular, is left entirely to the legislature; and although laws may be passed which have a contrary tendency, and which, in their consequences, may injure, instead of promoting, the public worship, yet the legislature is to judge; and even their erroneous construction of the design of the people, as expressed in the said declaration, must have legal effect.

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so far as they are not manifestly repugnant to the principles of the constitution.

This being the character of the legislative power on this all important subject, we are at a loss to conceive how it can be restrained, when it is professedly exercised for the purpose of enlarging, instead of diminishing, the rights of the citizen on the subject of religious worship. Great responsibility rests upon the legislature, and also upon the people, in delegating power to those who have almost unlimited authority. If they, with a view to secure the rights of conscience, pass laws, within the letter of the constitution, which may have a tendency injuriously to affect the regular public worship, it is not for the judiciary power to control their course.

The mischief to be dreaded is the breaking up of the parochial religious establishments, by authorizing any number of individuals to withdraw themselves, in the easy and loose way which is provided in this act. But they have the authority, and they have continually exercised it, to incorporate parts of parishes, and even individuals, as poll parishes; and by this means to diminish the resources of the religious communities from which such corporations are taken. They may incorporate five, ten, or twenty people for this purpose; and there seems to be no more constitutional difficulties in the way of vesting societies unincorporated, and the members of them, with the same privileges.

This may be an abuse of power, for which they are amenable to their constituents; but these acts are not therefore void. It is certainly unjust to leave the standing parishes liable to [*349] penalties, if they do not *maintain a minister, and not to impose any duty of the kind upon those whom they have exempted from the common burden. But in this they merely neglect their duty; and this neglect does not affect the validity of the acts which they may choose to pass.

Besides, it is known that there is an existing provision for the relief of towns and parishes from the burden of supporting a minister, when they shall become unable to do it, provided no contract is actually in force; for no prosecution can be maintained against a corporation for a neglect of this duty, unless a court has adjudged it to be of sufficient ability.

It has been supposed that, according to the principles stated in the case of *Barnes* vs. *The Inhabitants of the First Parish in Falmouth*, this legislative act is clearly repugnant to the constitution of the state. But no such inference can be drawn from that case The question to be settled there was, whether the minister of an unincorporated society could maintain an action against the parish,

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for the taxes paid by one of his hearers. The action was founded altogether upon the supposed constitutional right of the minister, in behalf of his hearer; and no legislative act had then been passed tending to vary or affect the natural and obvious meaning of the terms of the articles of the declaration of rights before cited; it being clear by those articles that the privilege of appropriating money paid to another use than that of the town or parish into whose treasury it was paid applied only when the appropriation was to be made to the use of a teacher of a public society, and that by a public society was intended one known and incorporated. The plaintiff in that suit could not prevail.

That decision was correct; and it was probably to avoid the effect of it that the legislature passed the law in question. It nowhere appears in the learned and elaborate opinion delivered in that case, that the power of the legislature over the subject was questioned. On the contrary, the following expressions may be considered as an admission of that power. The chief
*justice observed, "that it seems a mistake to suppose [*350]
that the legislature cannot grant any further relief in particular cases, which in its discretion it may consider as deserving relief."

Such relief had been before granted to Quakers, in whose favor no exception had been made by the constitution. The same right exists with respect to Baptists, or those of any other denomination different from that which prevails in the town of which they are inhabitants; and it may be applied in favor of Congregationalists, where they are a minority, and dissent from the established worship of the town, or Episcopalians, or any other sect, who may unite and form themselves into a separate society.

Whether it is expedient to give legislative sanction to a system so destructive to regular and orderly worship, we again say we are not to judge. We are, however, satisfied that there is nothing in the constitution which prohibits this exercise of power.

One of the objections to the effect of the exemption of the plaintiff in error is, that the society, of which he is a member, had no settled minister; but hired one only for one Sabbath in a month. But here, again, the legislature has authorized this; not having required, as essential to an exemption, that there should be any minister at all, but only a society and a committee. In the case of *Kendall* vs. *The Inhabitants of Kingston*, (4) the opinion of the court against the plaintiff's right to recover was founded upon the constitution and the statute of 1799, c. 87, which clearly indicated

(4) 5 *Mass. Rep.* 524.

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that the minister who sued must be the minister of the parish, or town, or incorporated religious society, and not have been ordained over the whole religious community to which he belonged.

But the statute of 1811 makes no such requisition; expressly giving the right to the preacher on whom the party taxed shall attend, whether he be ordained at large, or over a particular society; or whether he divide his labors among twenty different societies, or confine them entirely to one. The provision of [*351] the act is * too broad to exclude the members of any society, large enough to choose a committee, from the enjoyment of its privileges; and it does not appear that even attendants upon public worship any where is necessary to secure the exemption.

Judgment reversed.

HANNAH CLARK *versus* ISRAEL MUNROE.

Where a husband received a conveyance of land in fee, and at the same time mortgaged it to a third person, and the mortgage was afterwards foreclosed, his widow had no right to dower from such instantaneous seisin of her husband.

THIS was a writ of *dower*, which was tried, at the last April term in this county, before *Jackson*, J. The facts in the case shortly were, that *James Andrews* and his wife, on the 7th of May, 1805, conveyed the premises, of which the demandant claims to be endowed, to *William Clark*, her late husband; and that the said *William*, by his deed, dated and executed at the same time, mortgaged the same premises to one *James Winthrop* in fee; both which deeds were acknowledged and recorded at the same time; that the said *James Winthrop* was then the guardian of one *Charles Winthrop*, a minor, to whom he afterwards assigned them; that the said *Charles* afterwards entered and foreclosed the said mortgage, and assigned the premises to the present tenant.

It was also in evidence that the consideration of the said deed from *Andrews* and his wife to said *Clark* was the property of the said *Charles Winthrop*, and that the said mortgage was made in pursuance of a previous agreement between all the parties to both deeds, to secure the said consideration for the use and benefit of the said *Charles*.

The judge directed the jury that, in consequence of the said agreement, and the execution of said deeds pursuant thereto, the

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said *William* had only such an instantaneous seisin as would not entitle the demandant to recover her dower in the said premises.

The demandant excepted to this opinion of the judge, *and the cause came before the Court at this term [*352] upon the said exception.

Newton for the demandant.

Lincoln for the tenant.

Per Curiam. In the case of *Holbrook* vs. *Finney*, (1) it was decided that a conveyance in fee, and a reconveyance by the grantee to the grantor in mortgage, being considered as parts of the same transaction, did not give to the grantee such a seisin as entitled his wife to have dower in the granted premises. In the case at bar, the mortgage was to a third party; but still the whole constituted but one transaction. We are not able to view the case in any light different from what it would have presented had the mortgage of *Clark* been made to *Andrews* and his wife instead of *Winthrop*. (*a*)

Judgment for the tenant on the verdict.

(1) 4 *Mass. Rep.* 566.
(*a*) [*Coates* vs. *Cheever*, 1 *Cowen's Rep.* 460 — ED.]

LEWIS GALE *versus* THOMAS W. WARD.

Where the owner of a manufactory had mortgaged the building and the appurtenances for carrying on the same, but still remained in possession, it was holden, that certain fixtures, which could not be taken out of the building without being first taken in pieces, were liable to attachment at the suit of the creditors of the mortgagor

THIS was an action upon the case against the defendant, as sheriff of this county, for not keeping certain chattels attached by him, at the suit of the plaintiff against one *W. Beaton*; and for not taking the same on the execution, which was issued on the judgment recovered by the plaintiff in that suit.

On the trial, which was had on the general issue before *Jackson*, J., at the last April term in this county, it appeared that the original writ, in the plaintiff's said action against *Beaton*, was delivered to the defendant to be served; and that he went with the plaintiff to a certain wool-carding factory, then occupied by the said *Beaton*, and there attached, among other things, "all the right which the

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said *Beaton* had in three machines for carding wool;" as appears by his return endorsed on said writ. The said machines [*353] were not removed by *the defendant; but he at the same time attached, by virtue of the same writ, the right in equity of the said *Beaton* to redeem the said factory, which had been mortgaged by him as hereafter mentioned. This attachment was made on the 3d of February, 1816.

On the 6th day of the same February, the same machines were attached by one of the defendant's deputies, at the suit of certain other creditors of the said *Beaton*, and by their direction were removed from the said building, and kept in the possession of the said deputy sheriff.

The defendant, being informed of this, did, on the 7th of said February, attach the same machines again, in the hands of his said deputy, as stated in his return endorsed on the first-mentioned writ.

The plaintiff, having recovered judgment in his said action against *Beaton*, sued out execution thereon, and delivered it to the defendant to be served, within thirty days after the rendition of the said judgment. The defendant delivered it to the above-mentioned deputy, by whom the said machines were sold, and the whole proceeds thereof were applied to the discharge of other executions against the said *Beaton*, which were not proved by the said deputy to be entitled to priority.

On the return day of said execution, the said deputy, finding no goods or estate of said *Beaton*, applied to the defendant for directions; when the defendant told him to take the body of *Beaton*, unless the plaintiff should give him other instructions. On the same day the plaintiff told the said deputy not to take the body of *Beaton;* and as it was well known to both of them that there was *no* other property of *Beaton's* that could then be taken on the execution, the plaintiff directed him to return it in no part satisfied; the plaintiff saying, at the same time, that he should resort to the defendant for his remedy in this case, and that he would not have any thing done with the execution which should defeat or impair his said remedy against the defendant.

The question was, whether the said three machines were, at the time of the said attachment by the defendant, [*354] *the property of the said *Beaton*, and liable to the attachment; and if so, whether they were real or personal estate.

It appeared that the said factory and the machines were, on the 11th of February, 1815, the property of *P. & D. Brigham*, who on that day sold and conveyed the land, "having a wool-carding factory, and the appurtenances for carrying on the same, which [as

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it is said in the deed] are comprised in this grant," to the said *Beaton*; and he at the same time gave to the said *Brighams* a mortgage deed of the same premises, by a like description, to secure the payment of the purchase money. The said *Beaton*, about the same time, gave to the said *Brighams* a lease of the said premises, by a like description, for the term of one year and more.

It appeared that the said three carding-machines stood on the floor of the said factory building, not nailed to the floor, nor in any manner attached or annexed to the building, unless it was by the leather band, which passed over the wheel or pulley, as it is called, to give motion to the machines. This band might be slipped off the pulley by hand, and it was taken off and the machines removed from time to time, when they were repaired. Each machine was so heavy as to require four men to move it on the floor, and was too large to be taken out at the door; but it was so constructed as to be easily unscrewed and taken in pieces; and the machines were so taken in pieces, when removed by the deputy sheriff, as above mentioned.

On the 5th day of said February, the said *P. Brigham* endeavored to secure the said machines by nails or spikes driven into the floor; and these were drawn out by the deputy sheriff, when he attached and removed them on the 6th of said February, as above mentioned.

There was no bargain or contract of any kind, respecting the said machines, between the said *Beaton* and the said *P. & D. Brigham*, except what was contained in the two deeds and the lease above mentioned.

As to the amount of damages to which the plaintiff
* was entitled, if to any, it appeared that the said deputy [*355]
sheriff had made three several attachments of the same machines before the said attachment made by the defendant; but he did not remove the machines upon making these attachments, but left them standing in the building, in the same manner that the defendant afterwards did when he made the attachment now in question. When the machines were afterwards sold by the said deputy sheriff, he applied the proceeds thereof, first to satisfy the three first attachments made by him as afore-mentioned, and the balance, being 82 dollars 89 cents, he applied to the satisfaction of other executions in his hands against the said *Beaton*.

A verdict was taken for the plaintiff, for the whole amount of his judgment against *Beaton*, with interest; being 110 dollars 11 cents, subject to the opinion of the Court upon the foregoing facts reported by the judge, and the said verdict was to be set aside, or

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amended, or altered, as the Court should judge proper upon the said facts.

Burnside and *Ward*, for the defendant, contended that the machines in question were component parts of the manufactory, essential to the use or occupation of the building, and therefore were to be considered as real property, not to be removed on attachment.

But if they were to be considered as personal chattels, the property of them was not in *Beaton*, so as to be subject to attachment upon process against him. The *Brighams* were the legal owners; and the deputy sheriff who removed the machines is liable to them in trespass, as the defendant would also have been had he taken them.

If the defendant was liable to the plaintiff originally, yet, by the interference of the latter, and his prohibiting the body of his debtor to be taken in execution, he has lost his remedy against the defendant.

Lincoln, for the plaintiff, argued that the machines were mere personal chattels, and subject to be removed when attached as other chattels. (1)

[*356] * They were the property of *Beaton* after the conveyance by *Brigham* to him, and being left in his possession after his mortgage, the mortgage was fraudulent as against creditors. (2)

The defendant is liable in this action for neglecting to seize and sell the machines on the plaintiff's execution; the possession of his deputy being, in contemplation of law, his own possession. (3)

Nor has the plaintiff defeated his right of action, by forbidding the imprisonment of the judgment debtor in execution, since it sufficiently appears in the case that such imprisonment would have been wholly fruitless. (4)

PARKER, C. J. The attachment made by the sheriff was incomplete, for want of removing the machines, or of giving such notice of the attachment, by placing them in the custody of a servant, as would have prevented a second attachment.

They must be considered as personal property; because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes. It is true that the relaxation of the

(1) 1 *Salk.* 368, *Poole's* case. — 3 *East*, 38, *Elwes* vs. *Maw*. — 2 *East*, 88, *Penton* vs. *Robart*. — 8 *Mass. Rep.* 416, *Taylor* vs. *Townsend*. — 4 *Mass. Rep.* 514, *Wells & Al.* vs. *Banister & Al.*

(2) 1 *Wils.* 260, *Ryall* vs. *Rolle*.

(3) 13 *Mass. Rep.* 114, *Vinton* vs. *Bradford*.

(4) 11 *Mass. Rep.* 317, *Lyman* vs. *Lyman & Al.*

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ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view; and it is to be considered, where they are removed from the reality by an officer, who takes them for the debt of the tenant, that they go substantially to his use.

The mortgagees of the building and privilege, not being in possession, had no possession of the machines, which were therefore liable for the debts of the mortgagor.

Whether the deputy sheriff, who made the second attachment, did right in satisfying posterior executions out of this property, before the plaintiff's, is a matter to be settled between him and his master, and not a subject of inquiry in the present case. For the sheriff, having had it in his power to attach, and having returned * that he did attach, is liable for not having the [*357] machines to satisfy the plaintiff's execution. (*a*)

Judgment according to the verdict.

(*a*) [2 *Kent*, 3d ed. 343, 345. — *Walker* vs. *Sherman*, 20 *Wend.* 636. — *Morgan* vs. *Arthur*, 3 *Watts*, 140. — *Lemar* vs. *Miles*, 4 *Watts*, 330. — *Greene* vs. *Malden*, 10 *Pick.* 504. — *Kirwan* vs. *Latour*, 1 *Harr. & Johns.* 284. — *Farrar* vs. *Stackpole*, 6 *Greenl.* 154. — *Powell* vs. *Monson and Brimfield Manufacturing Company*, 3 *Mass.* 459. — *Cresson* vs. *Stout*, 17 *Johns.* 116. — *Tobias* vs. *Francis*, 3 *Vern.* 425. — *Swift* vs. *Thomson*, 9 *Conn.* 63. — *Winslow* vs. *The Merchants Ins. Co.* 4 *Met.* 306. — ED.]

ELIJAH WILDER, Appellant, &c., *versus* DANIEL GOSS.

A testator, among other descendants, left sundry children of a deceased daughter. In his will, he mentions her husband as his son-in-law, and gives a legacy to one of the said grandchildren; from which it was inferred that he had not forgotten the other children of his said daughter; and that they were therefore not entitled to a proportion of his estate, as though he had died intestate, under the provision of the statute of 1783, c. 24, § 8.

THIS was an appeal from an order or decree of the judge of probate for this county, accepting and allowing the report of commissioners, appointed by him to make partition of the real estate, of which *Thomas Goss*, deceased, died seised and possessed, among the devisees named in the last will of said deceased, according to the said last will. The appeal was claimed and made in right of *Sophia Wilder*, wife of the appellant, on the ground that she, being a grandchild, and by representation an heir at law, of the said deceased, and not having any legacy or devise made in her favor in the said will, nor being mentioned therein, ought by law to have

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had her share or portion of said deceased's estate assigned to her, in the same manner as if the said *Thomas* had died intestate; yet the said commissioners had not assigned to her any part of said estate in the said partition. And it was agreed that the said *Sophia* was such grandchild and heir at law, her mother, *Rebecca Thurston*, having been a daughter of the testator, and having died before him, and before the execution of the said will, leaving seven children, who all survived the testator, their grandfather.

The testator, in his said will, observes that, having before that time conveyed to his *son-in-law*, *John Thurston*, (who was the husband of his daughter *Rebecca*,) the principal part of his real estate, in payment of a debt he owed him, in reward for his labor and service, and to enable him to pay a debt, for which the testator had mortgaged his farm, he shall not devise any portion of his estate to him. He then gives certain chattels to his
[* 358] * *grandson*, *Thomas Thurston*, brother of the said *Sophia*; and after divers other legacies, specific and pecuniary, he devises the residue of his estate to his three daughters then living.

By the statute of 1783, c. 24, § 8, it is enacted, "that any child or children, or their legal representatives, in case of their death, not having a legacy given him or them in the last will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate; provided such child, children, or grandchildren, have not had an equal proportion of the deceased's estate bestowed on him, her, or them, in the deceased's lifetime."

Smith, for the appellant. The most liberal construction given to the statute by this Court in the cases of *Terry & Al.* vs. *Foster & Al.*, (1) *Wild & Ux.* vs. *Brewer*, (2) and *Church* vs. *Crocker*, (3) which are all the cases that appear to have brought this provision into question, is, that though it is not necessary that the child or grandchild should have a legacy by the will, yet he must be named, or in some way noticed in the will. Unless the Court in this case will go beyond the principle, in those decisions, which seems to be intelligible, definite, and certain, the decree of the judge of probate must be reversed. Another construction, excluding the claim of the appellant, will leave the law so unsettled that every case will be a new one, and require a distinct adjudication.

Burnside, for the respondent. The three cases already mentioned are the only ones in our own reports upon this point; and

(1) 1 *Mass. Rep.* 146. (2) 2 *Mass Rep.* 570.
(3) 3 *Mass. Rep.* 17.

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we should look in vain into the decisions of other courts for aid in the construction of this clause of this statute.

The provision was unquestionably intended to protect heirs from the forgetfulness of their ancestors and the mistakes of scriveners. So says the preamble of the provincial act of 12 *Will.* 3, which contained a similar provision, and of which the statute of 1783 is a * revision. And in the cases decided, the [* **359**] Court adopt the reason given in that preamble, though the act itself is repealed. Then, if it appears to the Court that the child claiming the distributive share was not forgotten by the testator, the provision of the statute has no application.

Now, in the case before the Court, there is satisfactory ground of presumption that the wife of the appellant was not forgotten. The testator mentions her father, *John Thurston*, as his son-in-law, and speaks of an advancement to him. The very term *son-in-law* implies a reference to his wife and children; and if his wife, *Rebecca*, had survived her father, she certainly could have claimed no share of his estate; much less can her child claim. Further, the naming of *Thomas*, a brother of the appellant's wife, shows plainly that he had called his grandchildren to mind.

Per Curiam. The cases referred to in the argument in principle approach very near to the case before us. Wherever it appears that the testator has, through forgetfulness or mistake, omitted to bestow any thing upon his child or grandchild, the legislature wisely intended to effect that which it was highly reasonable to believe the testator, but for such forgetfulness or mistake, would himself have done. To go further than this would be, in its measure, to defeat the principal intention of the legislature, in the first section of the statute, which authorizes every person seised of an estate in lands, which may extend beyond his own life, to devise the same as he shall think fit. Wherever, then, it may be fairly presumed, from the tenor of the will, or of any clause in it, that the testator intentionally omits to give a legacy or to make a devise to his child, or grandchild whose parent is dead, the Court will not interfere.

How is the case at bar in relation to these principles? Have we sufficient ground to say that the appellant's wife was omitted, in the distribution of her grandfather's property, through his forgetfulness of her, or by any mistake? We think not. The testator discovers * a full and particular recollection of [* **360**] her father, and of some past dealings between them. He recognizes him as his *son-in-law*, which must have brought his deceased daughter to his recollection. He gives a legacy to one of her children, who bore his name; by which it appears that the family was in his remembrance. These two circumstances, we

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think, bring this case within the reason of the former decisions of this Court which have been referred to.

Decree affirmed

DANIEL STONE AND OTHERS, Petitioners, &c., *versus* JONATHAN DAVIS AND OTHERS.

No review lies upon a report of referees, appointed pursuant to *Stat.* 1786, c. 21, where the party found indebted has paid the sum awarded, and the report, with the acknowledgment of satisfaction, had been returned and recorded, according to the statute.

THIS was a petition for a review of a judgment rendered by the Circuit Court of Common Pleas for this county.

The petition stated that the said *Davis & Al.* having a demand against the said *Stone & Al.*, the parties had, by an agreement entered into before a justice of the peace, pursuant to the statute of 1786, c. 21, submitted the same to the decision of certain referees, who had made a report, in favor of the respondents, to that court. The petitioners having paid the sum awarded against them, the respondents had acknowledged the payment thereof, by their receipt on the back of the report, which had been returned and recorded according to the statute. The petition states certain facts, which had come to their knowledge since the acceptance of the report, which, in equity and good conscience, would entitle them to a rehearing of the matter submitted to the referees.

Bigelow, for the petitioners. By the statute of 1791, c. 17, § 2, the justices of this Court "are vested with
[* 361] *a discretionary power to grant reviews in civil actions, whenever they shall judge it to be reasonable." It will not be denied that this was a civil action. Nor is it an objection to this application, that the decision complained of was made by judges of the parties' own selection. This Court has often granted reviews of actions, which had been submitted to the award of referees by a rule entered into in the Court of Common Pleas; and in such cases have ordered new pleadings. In this case, it is true, there is no declaration in form; but a declaration is but a part of the pleadings; and the Court may as well order the respondents to file a declaration upon their original demand, as to direct new pleas to a declaration already formed. If it be objected that, in this case, the parties found by the referees to be in debt

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have paid the amount found due before the report was returned to the Court, and so no formal judgment was rendered, it is answered, that, by the statute of 1788, c. 11, § 2, this Court is authorized to grant reviews in cases, where no judgment has been rendered.

Per Curiam. The petitioners exhibit a strong claim in justice to a rehearing of their cause. But they seem to be without legal remedy. Were we to grant them a review, we are not able to conceive by what course of proceedings we could set aside the award of the referees. The proceedings are entirely regular in point of form. Were they brought before us by an order on this petition, they would not show any common law action. There would be no declaration, no plea, nor issue, nor judgment. We could not compel the respondents to file a declaration, upon which the petitioners could plead to issue. In truth, the parties, from the beginning, selected another forum; they submitted the question between them to judges of their own choosing; they never intended to have the question decided at law. To entertain the cause here, would be utterly changing the whole ground upon which the parties have voluntarily placed themselves. Upon the facts disclosed, and which hitherto we have taken as not denied, the petitioners have a very hard case, and *are suffering great injustice. But it is the effect of their own conduct, in putting their cause out of the course of the common law. Cases of equal hardship frequently occur, from causes not dissimilar to that in the present case. They are, however, out of our power to remedy. Had fraud been shown in any stage of the proceedings, the petitioners might have obtained relief; but here was nothing more than mistake. [*362]

The petitioners can take nothing by their petition.

Lincoln for the respondents.

THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE UNION BANK *versus* ROYAL THAYER.

Judgment upon mortgage may be entered upon filing an attested copy of the deed, instead of the original.

THE tenant having been defaulted in an action by the demandants for possession of certain lands, which had been mortgaged to them by the said *Thayer*, *Bigelow* moved the Court for direc-

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tions to the clerk to enter judgment upon filing an attested copy of the mortgage deed, instead of the original; stating that, after judgment, and before the right to redeem expires, mortgagees often pay the debt at the bank, and desire a release on the back of the mortgage deed. And the Court authorized the clerk to do so in this case, and said they saw no objection to his considering it as a general rule for his guidance.

[* 363]

* THE INHABITANTS OF HARDWICK *versus* THE INHABITANTS OF RAYNHAM.

Where one, before the 10th of April, 1767, had hired a house, but before the removal of his family into it had gone abroad, and in his absence his family removed into it, and were not warned to depart within twelve months from such removal, he gained a settlement in the town in which such house was situate.

ASSUMPSIT for the support of a pauper, alleged by the plaintiffs to have her legal settlement in *Raynham*.

By an agreed statement of facts, submitting the action to the decision of the Court, it appeared that the pauper, *Densa Presho*, derived her settlement from her great-grandfather *Peter Presho*, who had his settlement in the town of *Raynham* in November, 1765; and the said *Densa* had her settlement in that town, unless the said *Peter*, by the following facts, after that time acquired a settlement in *Taunton*.

In November, 1765, the said *Peter* hired of one *Benjamin Lincoln* house in said *Taunton*, with a view to remove his family thither as soon as the circumstances thereof would admit, (his wife being then far advanced in pregnancy, and having been delivered of a child in December following,) and at the same time contracted with one *Field* to remove his family to the said hired house in *Taunton* as soon as their circumstances would permit. The said *Peter* then went on a voyage to *Egg Harbor*, in the province of *New Jersey*, to make shingles. The said *Field*, in pursuance of said contract, on the 28th of January, 1766, removed the said *Peter's* wife and children to his said hired house in *Taunton*. The said *Peter*, while residing at *Egg Harbor*, addressed a letter to his wife in *Taunton*, and afterwards, in August or September, 1766, returned to his family, then residing in the said house; and afterwards built a house in said *Taunton*, which belonged to his wife.

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and continued to dwell therein for eight or ten years, until his death, neither himself nor his family having been at any time warned to depart.

If, upon the foregoing facts, the Court should be of opinion that the said *Peter Presho* gained a settlement *in the town of *Taunton*, the plaintiffs agreed to become nonsuit; otherwise the defendants agreed to be defaulted, and that judgment should be rendered against them for a sum specified. [*364]

Bigelow, for the plaintiffs. By the laws in force prior to April, 1767, "If any person or persons *came to sojourn or dwell* in any town, and remained three months, [afterwards extended to twelve months,] not being warned to depart, he or they thereby gained a settlement in such town." (1) *Peter Presho* did not go to *Taunton* to sojourn or dwell before August, 1766. There were not, then, twelve months in which he could be warned to depart. He could not be warned while residing at *Egg Harbor*, and a warning to his wife and children in his absence would have been without effect. The whole question of settlement resting in him, the warning must necessarily be to him personally. (2) If left at the residence of his family, in a place where he had never dwelt, it could never have been truly said to be left at his last and usual place of abode.

Hastings, for the defendants, contended that within the equity of the provincial acts, the residence of *Peter Presho* in *Taunton* commenced on the removal of his family thither in January, 1766. From that time he had lost his habitancy in *Raynham*, was taxable in *Taunton*, and must have been named as of *Taunton* in any legal process. A warning left at the place of abode of his family would have been sufficiently executed. Had his family removed without his approbation or consent, the effect might have been different; but the removal in this case was his own act. He recognized *Taunton* as his home, by addressing a letter to his family there; and, indeed, it was to all intents his domicile or home. (3)

PARKER, C. J. The question to be decided in this case is, whether *Peter Presho*, the grandfather of the pauper, had gained a settlement in *Taunton*, by having resided there one year before the 10th of April, 1767; it being agreed that neither he nor his family were warned to depart from that town.

*It appears that, on the 28th of January, 1766, he had caused his family to be removed from *Raynham* to [*365]

(1) *Prov. L.* 4 *W. & M.* c. 12. — 12 and 13 *W.* 3, c. 10. — *Anc. Charters*, &c. 251
(2) 3 *Mass. Rep.* 322, *Shirley* vs. *Watertown*.
(3) 4 *Mass. Rep.* 312, *Abington* vs. *Boston*.

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Taunton, where he had some months before hired a house, with intent to remove and dwell therein; that he himself, before the removal of his family, had left *Raynham*, without any intention to return thither, and having, in fact, no domicile there, after he commenced his excursion to *New Jersey*; that, when he returned, he came to *Taunton*, to his family, and not to *Raynham*; and that he continued to live in *Taunton* for eight or ten years, during which time he built a house there, which he occupied with his family.

Under these circumstances, we are of opinion that, within the intent and meaning of the law then in force, he came to reside in *Taunton* when he changed his domicile and removed his family to that place. He must be considered as having left *Raynham*, and given up his settlement, when he went abroad; having before that time provided a new habitation in *Taunton*, and intending to return to and to make his final home at that place.

Had legal process, for any cause, issued against him, it could not have been served by leaving a summons or a copy at his former dwelling-house in *Raynham*, as his last and usual place of abode; for where his family dwelt was his house, and his absence could not render it less his domicile. A warning by *Taunton*, left at the house occupied by his family in that town, would have been sufficient to prevent his acquiring a settlement there, and to exonerate them from the obligation to support him or his family, although he had not personally come to reside there.

The removal of his family was an act of notoriety sufficient to put *Taunton* on its guard; and not having warned him or his family, that town must be considered as having adopted him as an inhabitant. We think his residence commenced, constructively, at *Taunton* on the 28th of January, 1766, when the house he had hired began to be occupied, according to his views and intentions when he contracted for it. The plaintiffs must
[* 366] * therefore be called, and the defendants have judgment for their costs.

Plaintiffs nonsuit.

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BENJAMIN S. RICE, Plaintiff in Review and original Plaintiff, *versus* ROBERT TOWNSEND.

Where a declaration contained two counts for two several causes of action, and on one trial the plaintiff had obtained a verdict on one count, and on the second trial, on the appeal, had a verdict on the other, which was for a much less sum than the sum for which the first verdict was returned, he was holden entitled to a review of the action.

THE original action was *assumpsit*, the declaration containing two counts. In the first count the plaintiff demanded 13 dollars, for certain work and labor; and in the second 360 dollars, for so much money had and received by the defendant for the plaintiff's use.

On the trial in the Court of Common Pleas, the jury returned a verdict for the plaintiff on the second count, and for the defendant on the first; and at the trial in this Court a verdict was found for the plaintiff on the first count for 13 dollars 38 cents, and for the defendant on the second count. Upon this last verdict the plaintiff brought this writ of review; which the defendant now moved the Court to quash, on the ground that the plaintiff was not entitled, by the statute, to a writ of review, not having had a verdict returned against him in the action.

The motion was supported by *Smith* and *Lincoln*, who contended that the right of review was limited to a party who had had one verdict against him. (1) The legislature did not intend to give a privilege to one party in an action denied to another. Yet it was clear that the defendant in this case, having had two verdicts against him, was not entitled to a review. That the Court will quash the writ on motion, if the plaintiff is not entitled to it, was settled in the case of *Hall* vs. *Wolcott*. (2) If the plaintiff is entitled to his review, it will follow that every plaintiff, dissatisfied with the damages, as assessed by the jury, may have a review as of right.

* *T.* and *A. Bigelow*, for the plaintiff, argued that [* 367] his case was substantially within the equity of the statute of 1786; and if it should be thought not within its letter, the Court could sustain the writ under the equitable powers given by the statute of 1788, c. 11. The plaintiff might have instituted two actions for the two several causes which are united in this, subject to paying costs in one of them. Had he done so, and had the verdicts been as they have been, he would, without any

(1) *Stat.* 1786, c. 66, § 1.

(2) 10 *Mass. Rep.* 218.

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question, have been entitled to a review in each action. There has been, in effect, only one verdict against the plaintiff on each of the causes of action.

Per Curiam. The motion is overruled, and the writ of review is sustained.

CHARLES BRIDGE *versus* ABRAHAM LINCOLN AND OTHERS.

One who had *bonâ fide* received, on the morning of the first Monday in April, two hundred dollars in advance of his yearly salary, was holden to possess the pecuniary qualification required by the constitution to entitle a citizen to vote in the election of governor, &c.

THIS action was in case against the defendants, the selectmen of the town of *Worcester* in the year 1814, for refusing to place the name of the plaintiff upon the list of voters for that year, qualified to vote in the choice of governor, lieutenant-governor, counsellors, and senators; and for refusing to receive his vote, when duly tendered at the meeting, for the choice aforesaid.

The declaration contained several counts, the third of which was as follows, *viz.:* "Also for that at *Worcester* aforesaid, on the 7th day of March last, the inhabitants of the said town of *Worcester*, who were qualified according to law to vote in the choice of town officers, were then and there duly convened in town meeting, it being the annual meeting of said inhabitants for the choice of town officers, and the said defendants were then and there legally chosen by said inhabitants to the office of selectmen of said town for the year then next ensuing, and did then and there severally accept said office, and were afterwards, on the [* 368] * same day, duly sworn, &c.; — all which by the records of said town appears. And the said defendants there afterwards, on the first Monday of April current, it being the 4th day, and the day appointed by the constitution of the commonwealth for the choice of a governor, &c., having previously called a meeting of said inhabitants according to law, to be holden on said day for the purpose aforesaid, the said defendants did convene at said *Worcester*, pursuant to the statute in such case made and provided, for the purpose of receiving evidence of the legal qualifications of such persons, belonging to said town, to vote at the meeting aforesaid, as had not previously been entered on the list of voters in said town, and for the purpose of correcting said list before the opening of said meeting, so as that the same list might contain the

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names of all the qualified voters belonging to said town. And the plaintiff, being then more than twenty-one years of age, and being then and ever since a citizen of said commonwealth, and an inhabitant of said town of *Worcester*, and having an estate within said commonwealth of the value of sixty pounds, and being in all respects qualified according to law to vote in the choice of governor, &c., and not being borne upon said list, did then and there, while the defendants, in their said capacity of selectmen of said town, were convened as aforesaid for the purposes aforesaid, present himself before them, and request them, in their capacity aforesaid, to put his name on said list, that he might be entitled to vote at said meeting in the choice of the aforesaid officers and magistrates of the said commonwealth, and did then and there exhibit to said selectmen good and sufficient legal evidence of his qualifications to vote in the choice of governor, &c., for the purpose of satisfying them of his being qualified as aforesaid. And the said defendants, there afterwards, on the same 4th day of April current, did preside as selectmen of said town of *Worcester*, at the said last-mentioned meeting, which had been duly called by them as aforesaid for the purpose of electing a governor, &c., and did then and there, in said capacity * of selectmen, call upon all [*369] persons belonging to said town, qualified according to law to vote at said meeting, to bring forward and to deliver to them, as selectmen of said town, their votes for a governor, &c. And the plaintiff, being qualified to vote as aforesaid, did then and there, in open town meeting, and before the close of the poll by the defendants, offer to them his vote for a governor, &c., and requested them, the said selectmen, to receive and count the same. Yet the said defendants, well knowing the plaintiff to be qualified as aforesaid, and that his name ought to be borne on said list, and that his vote ought to be received and counted by them in their said capacity, did, at the said meeting held by them for the purpose of receiving evidence as aforesaid, and of correcting said list, neglect and refuse to put the name of the plaintiff upon said list, and also at the said meeting of the said inhabitants, held on the said 4th day of April current, at all times before the close of the poll as aforesaid, and during the continuance of said meeting last mentioned, did refuse to receive and count the vote of the plaintiff offered as aforesaid; — by reason of all which the plaintiff wholly lost his privilege of voting at said meeting in the choice of governor, &c., as aforesaid. To the damage," &c.

At the trial, which was had on the general issue of not guilty, before *Jackson*, J., at the last April term in this county, the plaintiff proved all the facts alleged in the said third count, and that he

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was duly qualified as a voter in all respects, excepting only in the following particular, which was reserved for the consideration of the whole Court: —

Above five or six weeks before the first Monday of April, 1814, the day fixed by the constitution for the said election, the plaintiff, having then lately arrived at the age of twenty-one years, and having quitted the store in which he had been educated as a merchant, proposed to a certain cotton manufacturing company to take charge of their store in *Worcester* for one year, for the [* 370] salary of five hundred dollars a year. He then * stated that he should wish to have about one half of the said salary paid in advance, to enable him to pay his board and expenses, and for other purposes. The said company soon after acceded to his proposition, and he accordingly took charge of their said store in the latter part of March. The company was not incorporated; but this agreement was made in their behalf by two or three of the members, who owned one half of the joint stock, and who were chiefly relied on by the other members for managing the concerns of the company.

The agent and members of the company being in some of the neighboring towns, and not residing in *Worcester*, the plaintiff did not receive any part of the said advance when he entered the store; but on the morning of the said first Monday of April, one of the largest proprietors in the said company, and who had the principal charge in managing their affairs, happened to be in *Worcester*; and at the request of the plaintiff paid him two hundred dollars, for which the plaintiff gave his receipt as on account and in advance of his said yearly salary.

The original contract for said salary, and for receiving a part of it in advance, was not made with any reference to the said election, nor for the purpose of qualifying the plaintiff as a voter therein; but when the plaintiff happened to meet the said proprietor on the morning above mentioned, he requested to be paid at that time, in order that he might produce the two hundred dollars to the said selectmen, as conclusive evidence of his qualification as to property.

The question at the trial was, whether the money, thus received by the plaintiff, was *estate* in his possession, to the value of sixty pounds, within the true intent of the constitution, prescribing this qualification for such voters.

If the Court should be of opinion that it was so, the verdict, which was returned for the plaintiff, was to stand; otherwise it was to be set aside, and a general verdict entered for the defendants.

Bigelow and *Lincoln*, for the defendants. The pecuniary

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qualification of voters for governor, &c., as fixed
* by the constitution, is the "having a freehold estate [* 371]
within the commonwealth, of the annual income of
three pounds, or any estate of the value of sixty pounds," equal, in the present currency, to two hundred dollars. The question in this case arises on the latter provision; and the defendants say that, upon the facts disclosed, the plaintiff had not the qualification required. *Johnson's* definition of estate, applicable to the present inquiry, is "fortune, possession; generally meant of possessions in land or realities." The plaintiff, in fact, had no more estate or fortune, from being possessed of the money, which his employers had furnished him in advance, and for which he had given them an accountable receipt. He was, from the moment he received it, accountable to those who had advanced it to him, and for the whole amount, either in his labor or in money.

The contemplation of the framers of our constitution, in requiring this pecuniary qualification, small as it is, was that thereby the voter should feel some degree of independence and self-government. Yet in the very act of possessing himself of this money, the plaintiff became less independent than before. He was, from that time, morally as well as legally, the hired servant of the company, accountable to them for his time and his conduct.

If this was a sufficient pecuniary qualification for the plaintiff, so it would also have been for a person to whom he should have lent it, on a promise to repay it; and this process might have been continued indefinitely, and one sum of two hundred dollars have qualified any number of electors. For a promise to pay money is as truly an estate in the promisee as the money itself. If the plaintiff had seen fit to advance to his landlord a moiety of this money, and taken his accountable receipt for the sum advanced, it would have served his landlord as a qualification *pro tanto*, without diminishing that of the plaintiff.

Burnside, for the plaintiff. Estate means property in general; every thing which can be valued in money,
* which the possessor can lawfully transfer, which can [* 372]
be taken in execution, or for which the possessor is liable
to be assessed, notwithstanding any liabilities he may be under by reason of his possessing it. The plaintiff had two hundred dollars in possession, which he had obtained fairly, and which he had a right to retain against all the world. He did not give an *accountable* receipt for the money. Had he failed to perform the services, as he had undertaken, the company could not have demanded the money to be repaid, on the ground of the consideration having failed; but they must have brought their action for his failure of

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performing his contract, and in such action they would have recovered more or less than the sum advanced, as they should be able to prove their damages. (1) But until he had violated his engagement, no action lay against him; and the selectmen had no right to presume that he would so violate it.

Perhaps it cannot be denied that the plaintiff, by lending this money to another, on the day he received it, might have qualified another as a voter; but the supposition of a case so extreme, and which can hardly be conceived to take place without fraud, can never be supposed proper to influence a judicial decision.

The action stood continued for advisement, and at the following April term in this county, the opinion of the Court was delivered by

PARKER, C. J. We cannot doubt that the two hundred dollars, possessed by the plaintiff on the morning of the day of election, was his property, so as to be an estate to the value of sixty pounds, within the meaning of the constitution.

He received this money as his own property; pursuant to a contract before made, and then in performance by him, without any reference to his qualification as an elector. He had the absolute dominion over it, to pay his debts, to purchase property with it, or to give it away if he had seen fit. Had he died on the day of the election, his administrator would have rightfully chal-
[*373] lenged the property; and the persons who *advanced it could have supported no claim to it. By the word *estate*, as used in the constitution, it is obvious that every species of property, capable of valuation in money, was intended to be embraced. The elector is to have an annual income from real estate of three pounds, or any estate which is any property of the value of sixty pounds.

It is objected that he had given his accountable receipt for this money. But he was obliged to account for it no otherwise than by performing his contract. No action would lie upon this receipt; and it could only be shown in evidence to prove his contract, and to ascertain the damages attending a non-performance of it on his part.

It has been urged that the possessor of such a receipt might as well exhibit it as evidence of his qualification to vote, as the holder of the money. But it is not so. The receipt, in the hands of the person to whom it was given, is only evidence of a debt paid in advance, and not of any estate or property in the holder.

We do not mean to intimate that a transaction of this nature, resorted to for the purpose of giving the pecuniary qualification to an elector, could be successful. Such a subterfuge would be fraud-

(1) 2 *Burr.* 1011, *Dutch* vs. *Warren.*

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nlent and unavailing. The case reported excludes all suspicion of fraud, and leaves the single question, whether money thus obtained belongs to, and is the estate of, the holder; and we think it must be a harsh and severe construction of the constitution which could give room to doubt.

As to the question, whether the constitution intended that the estate, which is established as the qualification, should be over and above all debts due from the elector, we cannot imagine that so strict a scrutiny into every voter's affairs, as such a construction would require, was intended. If it were so, the selectmen, who are to decide promptly, and from the pressure of affairs are often held to decide instantaneously, would be obliged to spend hours, and perhaps days, in investigating the affairs of their fellow-citizens Besides which, this would necessarily produce such an exposure of every * man's circumstances, as would be [*374] injurious and vexatious. It cannot be supposed that this sort of inquisition was intended to be established by the constitution; but that the true intent and meaning of the constitution is, that every man, who is in possession of the requisite estate, claiming it as his own, and having the lawful right to dispose of it, shall be entitled to the franchise.

Judgment according to the verdict.

COMMONWEALTH *versus* LEVI SMITH, in Certiorari.

The exemption of engine-men from duty in the militia applies as well to members of volunteer or independent companies as to those of the standing militia.

But the right to such exemption is waived, if it exist at the time of the party's enlisting into such volunteer company.

To avail himself of such exemption, it is not sufficient to produce the certificate of his appointment to the commanding officer of the company after the day of muster or training.

THIS was a writ of *certiorari*, issued at the instance of *Smith*, the respondent, *W. E. Green*, Esq., a justice of the peace for this county, to bring up the proceedings had before the said justice, upon the complaint of *Edward D. Bangs*, clerk of a company of light infantry, against the said *Smith*, alleging him to have been duly enrolled in the said company, and to have unnecessarily neglected to appear at a muster of the company on the 7th day of May

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1816, although duly warned; whereupon the said justice had adjudged *Smith* to pay a fine of three dollars and costs.

The said judgment was grounded on a statement of facts, agreed and signed by the parties at the trial before the justice; purporting that *Smith* voluntarily enlisted in the said company several months previous to the said 7th day of May; that he was duly warned to appear on that day, and neglected so to do; that, before the said warning, *viz.*, in the month of April preceding, he was duly appointed by the selectmen of the town of *Worcester*, of which he was an inhabitant, to be one of the engine-men in and for said town for a year then next ensuing; and that, within eight days after the said 7th of May, he presented to the commanding officer of said company a certificate of his appointment, and liability to perform the duties thereof, according to the form of the statute in such case made and provided.

[* 375] * The error relied on, as sufficient to quash the proceedings, was, that *Smith*, by accepting the appointment of an engine-man, had ceased to be a member of the said company of light infantry, or to be liable to perform duty therein at the time aforesaid.

Burnside, for the respondent. The act for regulating, governing, and training, the militia of this commonwealth absolutely exempts from militia duty "such engine-men as shall annually produce to the commanding officer of the company, within whose bounds they reside, certificates from the selectmen of their respective towns, that they have been legally appointed and are bound to perform the duties of engine-men." (1)

Bangs, for the commonwealth. The enlistment of one into a volunteer company, as this is, deprives him of the right to accept the appointment to the office of engine-man, in which no one can be compelled to serve. The 14th article of the 34th section of the act provides, that "Every person, who shall enlist in any volunteer company (whether such person be exempted by this act from any military duty or not) shall be holden to do duty therein for the term of seven years, unless such person be sooner discharged by order of the commanding officer of the brigade." These two sections must be construed together; and the latter may be considered as a proviso, annexed to the first section, excluding from its operation persons enlisting into these volunteer companies, and limiting the exemptions to the ordinary militia.

Burnside. The exemption by the first section is absolute, and applies as well to the person producing to the commander of the

(1) *Stat.* 1809, c. 108, § 1.

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company a certificate of his appointment as an engine-man, as to the vice-president of the *United States*, or to a judge of this Court. If one is exempted, so is the other. The true meaning of the 14th article of the 34th section is, that the party enlisting in a volunteer company shall be holden to do duty seven years, notwithstanding any exemption he may be entitled to at the time of such enlistment. By * such enlistment he shall be considered [* **376**] as waiving his claim to such exemption. If an after election or appointment to office is held not to exempt him, then may the lieutenant-governor of the commonwealth, a judge of this Court, or the other high and responsible officers, mentioned as exempted, be called from the exercise of their important functions, to place themselves in the ranks of a company of militia, or be held liable to a fine at the suit of its clerk. Such a construction must be against public policy, as no citizens ambitious of those honorable stations would enlist upon such conditions. The construction contended for by the respondent is strongly countenanced by the decision of this Court in the case of *The Commonwealth* vs. *Thaxter*. (2)

Bangs. Every one enlisting in a volunteer company is aware of the terms on which he engages, and voluntarily subjects himself to the discipline, notwithstanding he may, within the term, be placed in a civil office, the rank of which he may think incompatible with that of a citizen soldier. But there is no doubt that, in case of the supposed elevation, he would be able to obtain his discharge; or if the duties of the two situations were incompatible, "he would be discharged, or at least excused from the performance of duty, while the impediment continued," as in the cases put by the Court in *The Commonwealth* vs. *Thaxter*. An engine-man is not, however, a public officer. He undertakes certain services, for which, but for his own voluntary act, he would be entitled to an adequate remuneration. It is his own folly, if he undertakes conflicting duties.

If, however, the respondent was entitled to the exemption he claims, he has not adopted the means necessary to avail himself of it in this case. His privilege did not attach, until he had produced the certificate of the selectmen to the commanding officer of the company.

Burnside. The duties of a soldier are as incompatible with the obligations of an engine-man, as with those of officers of a higher rank. The statute puts them all on the same ground.

* The statute requires the certificate to be produced [* **377**] annually. In this case, it was produced within the eight

(2) 11 *Mass. Rep.* 392.

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days allowed by the 32d article of the 34tn section of the act for presenting excuses.

The cause was continued for advisement, and the opinion of the Court was pronounced, at the following April term in this county, by

PARKER, C. J. We think the appointment to the place of an engine-man gives an exemption from military duty, as well in independent or volunteer companies as in those of the standing militia, they being different modifications only of the same duty; and that the enlistment being voluntary makes no difference, as it was merely a choice of the mode in which he would perform his service in the militia; also that the 14th article of the 34th section must be construed to operate upon exemptions existing at the time of the enlistment, they being waived by the enlistment. In the case before us, the appointment was subsequent to the enlistment; and this new duty gave the right to be exonerated from militia service.

But we think that the provision in the section containing the exemptions, that engine-men must produce annually a certificate of their appointment, was intended to protect the commander and clerk of the company from trouble and expense, which might be incurred by causing prosecutions where they might have no knowledge of the exemption; and that the period of eight days allowed by the statute is applicable to excuses, and not to exemptions, which need no excuse.

We are of opinion, therefore, that, at the time of the muster or training, for absenting himself from which the respondent was adjudged to pay a fine, he was not exempt, not having then produced his certificate to the commanding officer of the company.

Proceedings affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF NORFOLK, OCTOBER TERM, 1817. AT DEDHAM.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, } JUSTICES.
HON. CHARLES JACKSON, }

WILLIAM GOOCH, Executor, &c., *versus* HANNAH ATKINS

A widow's right to have dower assigned to her in land is not subject to be taken in execution.

Where a judgment creditor caused his execution to be extended, by mistake, upon land not liable to be levied upon, and directed the officer not to return the execution, it was holden that an action of debt lay for him upon the judgment, without an eviction.

THIS was an action of debt upon a judgment; to which the defendant pleaded payment in full satisfaction; on which issue was joined. She also pleaded that an execution, which was issued on the judgment, had been duly levied on certain real estate, and returned fully satisfied, setting forth particularly the execution, and the officer's return thereon.

By this return it appeared that the execution was levied, in part, on a certain dwelling-house and land, appraised at 4700 dollars, of

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which the defendant was seised in fee, and concerning which there was no question in this action; and for the residue, "on the dower which the said *Hannah Atkins* hath in the brick dwelling-house situate, &c., in which the said *Hannah Atkins* now dwells, together with all the rights and privileges belonging to the dower of the said *Hannah Atkins* in the said estate;" which last was appraised at 1047 dollars 84 cents.

[* 379] * To this the plaintiff replied that, at the time of the supposed levy, the defendant was not endowed, and had not had any estate of dower assigned her in the last-mentioned dwelling-house, as was supposed at the time of the levy; that the plaintiff, having discovered this before the return day of the execution, directed the officer not to return the same; and that it never was returned into the clerk's office; and so the execution was not fully satisfied, &c.

In the rejoinder, the defendant averred that the execution was fully satisfied, and tendered an issue to the country; to which there was a demurrer and joinder.

On the trial of the issue of fact, joined as aforesaid, which was had before *Wilde*, J., at the last February term in this county, the same facts appeared which are set forth in the special plea and replication above mentioned; and the cause was argued upon these facts, at the last March term in *Suffolk*, by *Bigelow* for the plaintiff, and *Whitman* for the defendant.

Bigelow. Debt lies in this case, as well as *scire facias.* (1) There is no need of showing an eviction in this case. The creditor discovering that his debtor had no such estate in the land, as he could extend his execution upon, prevented the return of the execution. (2)

If the defendant had had an estate in dower in the brick house, the rents and profits should have been levied upon, and assigned to the creditor, until they should have discharged his debt, instead of setting off the land by metes and bounds. It does not appear, from the return of the execution, whether the supposed dower embraced the whole or a part only of the dwelling-house. But the case finds that the defendant had dower in no part thereof. The execution is therefore unsatisfied in the sum of 1047 dollars 84 cents, which sum the plaintiff claims in this action, with interest.

Whitman. In the case of *Ladd* vs. *Blunt*, the levy of the execution was never completed; and the reasoning of the court in that case is entirely against the principles on which the present action

(1) 12 *Mass. Rep.* 195, *Hatch* vs. *Green.* — *Ibid.* 4, *Commonwealth* vs *Green*
(2) 4 *Mass. Rep.* 402, *Ladd* vs. *Blunt.*

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must be supported. *This is not the case, in which [*380] debt will lie by the statute, which provides only for the single mistake of an execution levied on lands not belonging to the debtor. (3) *Scire facias* alone will lie. (4)

But the defendant contends that it was the plaintiff's own folly that caused his misfortune, and the law furnishes him no remedy. If his neglecting to return his execution into the clerk's office, and this is the whole of the plaintiff's case, will give him an action on the judgment, a door will be opened for a very fraudulent practice. Whenever a judgment creditor is dissatisfied with the value set upon land by appraisers, he has only to keep the execution in his pocket, and may then harass his debtor with an action of debt.

The defendant was entitled to dower in this dwelling-house. That right was subject to be taken in execution; and the creditor might have procured an assignment of it in the dowager's name. If it be not so, a widow has it in her power to defraud her creditors, by neglecting to have dower assigned her.

Bigelow, in reply. The case shows that the defendant had not the estate in the dwelling-house which she was believed to have. The execution was then levied by mistake, which is the precise case contemplated in the statute. The case of *Tate & Al.* vs. *Anderson* (5) is a sufficient authority to support the present action.

Per Curiam. It was decided, in the case of *Hatch* vs. *Green*, that a judgment creditor, who had been evicted of part of the land taken in execution, might maintain an action of debt on the judgment for the appraised value of that part. The present case is stronger for the plaintiff, inasmuch as the plaintiff has never taken any thing by force of this supposed levy on the dower, as it is called; and it would be absurd to require that he should enter, when he knows that his title is defective, and that he should be evicted by a legal process, in order to maintain this action of debt on the judgment.

The only question therefore is, whether the defendant had any estate in the second parcel of land mentioned in the return; for if not, the execution and the *proceedings [*381] under it are wholly ineffectual as to that part, and the judgment remains unsatisfied for the sum at which it was appraised.

The return as to this point appears somewhat ambiguous. If it should be construed to mean that the estate appraised was the defendant's right to have her dower assigned and set off in the dwelling-house, it is void and ineffectual; because such a right

(3) *Stat.* 1785, c. 6.
(4) 2 *Mod.* 41. — 7 *Mod.* 62. — 1 *Esp. Dig.* 214, 240.
(5) 9 *Mass. Rep.* 92.

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cannot be taken in execution. If, on the other hand, it was understood at that time, as has been suggested in the argument, that this house had been assigned to the defendant as her dower, and if her estate as tenant in dower was intended to be appraised and taken on the execution, then it is ineffectual, because she had no such estate.

If the mistake had proceeded further, and the plaintiff, believing that the defendant was tenant in dower, had taken possession of the land, and continued to hold it, the case would present a different question. But it appears that he has never had possession; and by the pleadings in this action he would be estopped from ever claiming any estate in the land, under the levy of the execution. The proceedings, therefore, under the execution, as to this piece of land, are defeated and void.

As the plaintiff has never received any rents and profits from this land, he is entitled to interest, and must have judgment on the verdict for the sum of 1047 dollars 84 cents, with interest from the time of rendering the judgment.

[*382]

*THE INHABITANTS OF NEWTON *versus* THE INHABITANTS OF BRAINTREE.

Under the provincial act of 7 *Geo.* 3, c. 3, illegitimate children acquired no settlement by birth, but had the settlement of their mother.

ASSUMPSIT for the support of a pauper, alleged by the plaintiffs to be legally chargeable to the town of *Braintree*. It was agreed that the pauper was the illegitimate child of *Sarah Blanchard*, otherwise called *Sarah French*, and was born in *Newton* in the year 1790. *Sarah Blanchard*, the mother of the pauper, was the illegitimate child of *Sarah Blanchard* the elder, and was born in that part of *Braintree* which still retains the corporate name, on the 3d of March, 1767. In the year 1773, *Nathaniel French*, who was the reputed father of the pauper's mother, and who had a legal settlement in that part of *Braintree* which is now *Randolph*, married the said *Sarah Blanchard* the elder, and she resided there with her husband until his death, in 1780, and she continued to reside on the estate owned by her husband in that place until her death, in 1787. From the marriage of the said *Sarah* the elder, her daughter *Sarah* (the mother of the pauper) continued to reside with her until 1785;

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since which time neither she nor the pauper have acquired any legal settlement.

If, on these facts, it should be the opinion of the Court that the pauper had a legal settlement in *Braintree*, judgment was to be rendered for the plaintiffs upon the default of the defendants, for a sum agreed by the parties; otherwise the plaintiffs were to become nonsuit.

No argument was had, and the opinion of the Court was delivered at the last July term in *Plymouth*.

PARKER, C. J. In the case of *The Inhabitants of Petersham* vs. *The Inhabitants of Dana*, (1) it was decided that, by the statute of 1789, c. 14, an illegitimate child, which had the settlement of its mother at the time of its birth, would acquire a new settlement with the mother, until it should acquire one in its own right. * In the case of *The Inhabitants of Boylston* vs. [*383] *The Inhabitants of Princeton*, (2) it was settled that, under the statute of 1793, c. 32, now in force, an illegitimate child retains the settlement derived from the mother at the time of its birth, without being affected by any settlement subsequently gained by the mother.

The construction of these two statutes being thus judicially settled, we have only to inquire how the case stood with respect to the settlement of illegitimate children before they were passed; the pauper in question having gained a settlement in some place before those statutes were in force.

Under the provincial act of 7 *Geo.* 3, c. 3, illegitimate children acquired no settlement by birth, but had the settlement of their mother. At that period, the mother was capable of acquiring a new settlement by marriage; and the illegitimate child followed the settlement of the mother.

By the act incorporating the town of *Randolph*, (3) the inhabitants of that town were held to support all such poor persons as, at the time of passing the act, were, or before had been, or thereafterwards should be, inhabitants of that part of *Braintree* incorporated as *Randolph*, who then were, or might afterwards become, chargeable.

The pauper in question acquired no settlement by her birth in *Newton*, but had the settlement of her mother. This latter originally had a settlement in *Braintree*, by virtue of the settlement of her mother, who was a native of, and had a settlement in, that town. But upon her intermarriage with *French*, she was subject to change her settlement with her husband. His settlement was in *Randolph*, by virtue of the provisions of the act incorporating that

(1) 12 *Mass Rep.* 429. (2) 13 *Mass. Rep.* 381 (3) *Stat.* 1792, c. 49

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town His wife's settlement was transferred with his; that of her illegitimate daughter followed; and the pauper, who was the child of this daughter, has her legal settlement in the same place. So that this action cannot be maintained.

Plaintiffs nonsuit

[*384]

*THE INHABITANTS OF BOSTON *versus* THE INHABITANTS OF WELLS.

To gain a settlement in the fourth method described in the statute of 1793, c. 34, § 2, a citizen must dwell in the town *the same* three years that he holds therein an estate of freehold of the prescribed value.

THIS was an action of *assumpsit* for the reimbursement of sundry expenses, incurred by the plaintiffs in the relief and support of one *Rachel Webster*, whose settlement they allege to be in *Wells*.

At the trial, which was had upon the general issue, before *Wilde*, J., at the last February term in this county, the only question was, whether the legal settlement of the said pauper was in the town of *Wells*, or in the town of *Lyman*.

The defendants, to prove her settlement to be in *Lyman*, read in evidence a deed of bargain and sale of a small farm in said *Lyman*, from one *Chadbourn* to *Nathaniel Webster*, the father of the pauper's husband; and it was admitted that the pauper had a derivative settlement in said town of *Lyman*, provided the said *Nathaniel* gained a settlement there; otherwise her settlement was in *Wells*.

It was also admitted that the annual rents and profits of said farm, after said *Nathaniel* purchased it, exceeded ten dollars. It was also proved that the said *Nathaniel* received the rents and profits of the said farm for three successive years; and he testified that he lived on the farm three years and seven days. But he afterwards testified, in another deposition, that he removed into *Lyman* November 1, 1798; and on the 28th of October, 1801, he sold the same farm; and he finally removed from *Lyman* November 12, 1801.

The plaintiffs insisted that the said *Nathaniel Webster* never gained a settlement in *Lyman*, as he sold his estate before he had resided there three years complete. But the judge in-
[*385] structed the jury that, if they were *satisfied that he had received all the rents and profits for three complete years before he made sale of his farm, he thereby gained a settle-

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ment in *Lyman*, although he had not, at the time of the sale, resided the entire term of three years in said town; and the jury accordingly returned a verdict for the defendants. If the said instruction was wrong, the verdict was to be set aside, and a new trial had; otherwise judgment was to be rendered for the defendants for their costs.

An argument was had, at the last March term in *Suffolk*, by *Thatcher* for the plaintiffs, and *Richardson* for the defendants.

Thatcher admitted that *Nathaniel Webster* was the owner of the said farm from the 19th of October, 1798; so that, in fact, he was the owner of the estate, and he resided in *Lyman* for more than three years. He contended, however, that, by a true construction of the statute, those three years should be coincident; otherwise a person may be acquiring a settlement in two towns at the same time, which could certainly never have been the intention of the legislature. The party must dwell in the town the same three years that he owns and takes the profits of the estate. When *Webster* purchased the farm, it was not certain that he would remove to *Lyman*. It may be presumed, too, that he chose to retain his settlement in *Wells*, and with that intent left *Lyman* before the three years expired. It is the right or privilege of a citizen to acquire a new settlement, or retain his former one, at his option. If three full years' residence and ownership, contemporary with each other, are once dispensed with, no fixed rule can be made, and it is peculiarly true, in questions of settlement, that it is of vastly more interest to the community that principles and rules should be fixed and settled, than what those principles and rules are.

Richardson contended that it is a sufficient compliance with the statute, that the party resides in the town three years, and receives the whole rents and profits of an estate owned by him, and whose annual income is more than ten dollars, for the three years. Had the *legislature intended a perfect [*386] concurrence of the three requisites, another mode of expression would have been used.

At the last July term in *Plymouth*, the Court ordered a new trial, on the ground taken by the counsel for the plaintiffs, *viz.*, that a settlement is to be gained in the fourth manner provided in the statute (1) only when the citizen dwells and has his home in the town three years, and has an estate of inheritance or freehold of the required income during the whole of the same three years during which he shall so dwell or have his home. (*a*)

(1) *Stat.* 1793, c. 34.

(*a*) [*Inhab. Barre* vs. *Inhab. Greenwich*, 1 *Pick.* 129. — ED.]

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ELIZABETH WOODCOCK *versus* AZARIAH WALKER.

Scire facias does not lie upon an order of the Common Pleas, that the reputed father of an illegitimate child shall pay a weekly sum towards the maintenance of such child; and that he shall give a bond therefor, and to indemnify the town.

THIS was a writ of *scire facias*, returnable to the Circuit Court of Common Pleas for this county, in which the said *Elizabeth* recites that she preferred her complaint to the said court, at a former term thereof, upon which such proceedings were there had; that the said *Azariah* was adjudged the reputed father of an illegitimate child of which she had before that time been delivered; and it was thereupon ordered by the said court that the said *Azariah* should pay, towards the maintenance of said child, one dollar and fifty cents a week from the birth of the child until the further order of the court; and that he should give a bond, with sufficient surety or sureties, to pay the sum aforesaid, and also a bond to the town of *Needham*, to indemnify the said town from the maintenance of the said child; and should pay costs of the prosecution. The plaintiff then alleges that the said *Azariah* has not performed any part of said order; and prays for a remedy by execution or warrant of distress.

To this writ the said *Azariah* answers by a general demurrer, which is joined by the plaintiff.

Richardson, of counsel for the plaintiff, being called on to show that a writ of *scire facias* lies in this case,
[* 387] * contended that this was, in fact, a judgment of a court of record; and since the statute of *Westm.* 2, *scire facias* lies in many cases where it lay not at common law; (1) a formal judgment not being in all cases a prerequisite. *Richardson* stated the fact to have been, in this case, that the defendant, after the verdict was returned against him, had avoided; and as the magistrate before whom he was first carried had taken a recognizance instead of a bond, (2) if the plaintiff could not maintain the present process, she would be without remedy.

Chickering for the defendant.

Per Curiam. A writ of *scire facias* lies only to obtain execution of a judgment. This was merely an order that the defendant should give security, &c. The only mode of enforcing the performance of the order was to commit the defendant to prison until he should comply. The writ cannot be supported, and the defendant must take judgment for his costs.

(1) 2 *Inst.* 469.—1 Lord *Raym.* 669—469. (2) Vide 7 *Mass Rep.* 340—396.

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HAWKES FEARING AND OTHERS, Petitioners, &c.

The Court will not appoint commissioners of sewers, where all the proprietors of the lands alleged to be damaged join in the application.

THIS was an application to the Court for the appointment of commissioners of sewers, under the statute of 1795, c. 62. But it appearing that all the proprietors of the lands alleged to be damaged had joined in the application, *the Court* said they had no jurisdiction of the matter, and they referred to the case of *Swett & Al.* vs. *Bussey & Al.* (1) So the application was dismissed.

(1) 7 *Mass. Rep.* 503

COMMONWEALTH *versus* STEPHEN MURPHY.

The credibility of a female witness may properly be impeached, by proving her to be a common prostitute.

ON the trial of the prisoner, who was indicted for a rape, the *Attorney-General* offered evidence that a female witness, who had testified on behalf of the prisoner, had been the mother of several bastard children, and was notoriously a common prostitute.

* *G. Sullivan*, for the prisoner, objected to the admis- [* 388] sion of the evidence.

But the Court overruled the objection, observing that a common prostitute must necessarily have greatly corrupted, if not totally lost, the moral principle, and of course her respect for truth and her regard to the sacredness of an oath. The credibility of a witness may therefore be properly impeached, by proving her to be of such a character.

Ex relatione Mri. Fuller. (*a*)

(*a*) [This decision has no authority to sustain it. — *Bathews* vs. *Galindo*, 6 *L. J* 138, C. P. — When a witness is called to impeach the character of a former witness as to veracity, the proper inquiry is, whether the witness called knows the character of the former witness in this regard, and whether the witness called would believe the witness whose veracity is questioned when testifying upon oath. — 1 *Starkie*, 2 *Lond.* ed. 182. — 2 *Phil. & Am.* 925. — ED.]

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COMMONWEALTH *versus* SIMEON ALDEN.

The oath prescribed for poor prisoners in the statute of 1787, c. 29, need not be administered within the limits of the prison.

THE defendant, having been convicted of perjury in taking the poor prisoner's oath, moved in arrest of judgment, because it was not alleged in the indictment that the said oath was administered to him in the prison, or within the yard or liberty of the prison; and it did not appear thereby but that he was at large at that time.

[*Note.* — The certificate of the justices, who administered the oath to the defendant, was that it was so administered at the dwelling-house of *Samuel Daggett*, and it was so alleged in the indictment.]

Whitman, for the defendant, contended that the oath must be administered within the walls of the prison, or at most within the limits of the yard; and unless so administered, it was extrajudicial, and could not legally involve the guilt of perjury. If a prisoner, before being discharged, be beyond those limits, he has committed an escape, and is no longer a prisoner; nor can the oath be lawfully administered to him after such escape. (1)

Morton, (*Attorney-General*,) for the commonwealth. The question depends wholly on the statute providing the oath. (2) By the statute, the justices are authorized to appoint the time
[*389] and place for administering the oath; *and nothing therein requires it to be done within the prison. It is directed that the oath shall be administered at the time and place appointed. Further, if the party be not admitted to his oath by the justices, the statute directs that he shall be "*remanded* back to prison;" implying, necessarily, that he had been taken out for the purpose of taking the oath. Nor is the provision without the highest reason to support it. A contagious and mortal disease may prevail within the limits of the prison; and no justices could be expected to put themselves in a situation so hazardous.

By the Court. We think the indictment sufficient, and that the statute does not require the oath to be administered within the limits of the prison. There seems to be no assignable reason for such a provision; and there are several reasons opposed to it. It is wisely left to the discretion of the magistrates to appoint a suitable

(1) 2 *Burr.* 1125. — 3 *Burr.* 1697. — 3 *P. Will.* 485. — 2 *D. & E.* 586.
(2) *Stat.* 1787, c. 29.

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time and place; and a prisoner commits no escape in rendering himself at the time and place so appointed.

Motion overruled.

JOSEPH MORRILL *versus* ERASTUS WORTHINGTON.

A covenant to assign a chattel, in as full a manner as A B had assigned it, to the covenantor, does not necessarily imply that there shall be a covenant of warranty in such assignment.

It is the business of the assignee of a patent right to procure the deed of transfer to be recorded in the proper office.

THE declaration was, "In a plea of covenant broken, for that the said *Erastus*, at said *Dedham*, on the 7th day of December last past, by his certain writing of that date, sealed with his seal, and in Court to be produced, for and in consideration of 200 dollars, paid him by the said *Joseph*, did assign, transfer, and set over, to said *Joseph*, his heirs and assigns forever, one sixteenth part of the patent right to a certain new and useful machine for cutting files, which machine was invented by one *John Hatch*; and did, by said writing, covenant, among other things, with the said *Joseph*, that he would, when thereto required, within a reasonable time, make a further transfer of said *Hatch's* patent right to said *Joseph*, in as full a manner as said *Hatch* had engaged to do to said *Worthington*. Yet, though said *Erastus* has been often requested * and [* 390] demanded, and particularly on the 18th day of July last, at *Dedham* aforesaid, which was within a reasonable time after the execution and delivery of his said writing, to perform his covenant aforesaid, the said *Erastus* has not made to the said *Joseph* a further transfer of said *Hatch's* patent right aforesaid, in as full a manner as the said *Hatch* had engaged to do to said *Worthington*, but wholly refused so to do; and so said *Joseph* says that said *Erastus* his covenant aforesaid has not kept, but has broken the same, to the damage of," &c.

The defendant pleaded in bar, that, on the 31st of May last past, he procured from the said *Hatch* an assignment and further transfer of one sixteenth of the said patent right, (the said *Hatch* having previously obtained letters patent for the same,) in as full a manner as said *Hatch* had previously engaged to make the same to him, which is dated the day last mentioned, signed and sealed by *Hatch*, and in Court to be produced; and that, on the same day, having the said assignment, &c., in his possession, he wrote on the same another

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and further transfer and assignment from him, the said *Erastus*, to said *Joseph*, and signed and sealed the same, and afterwards on, &c., which was within a reasonable time, and at divers other times, offered to deliver, and is still ready and willing to deliver, the same to the said *Joseph*; and avers that it contained a further transfer of, &c., in as full a manner as the said *Hatch* had agreed to make the same to him.

The plaintiff replied that the said assignment from the defendant to him did not contain a further transfer of, &c., made in as full a manner as said *Hatch* had engaged to make the same to the defendant, and tendered an issue to the country, which was joined by the plaintiff.

On this issue the parties submitted the following facts to the Court: The said *Hatch*, prior to his obtaining letters patent for his invention of a file-machine, promised the defendant to assign to him one eighth part of his said patent; and afterwards [*391] on the 1st of * May, 1815, obtained the said letters patent, and while in possession thereof, *viz.*, on the 31st of the same May, he executed and delivered to the defendant an assignment of one sixteenth part of the said patent right, as follows, *viz.*: "Know all men, that I, *John Hatch*, of, &c., in consideration of 200 dollars, to me paid by *Erastus Worthington*, of, &c., have and do, by these presents, assign, transfer, and set over, to said *Worthington* one sixteenth part of all the right, title, and interest, I have in a certain patent right by me obtained on the 1st day of May present, which is called 'a new and useful invention for cutting files.' And I do hereby convey and relinquish all the profits and benefit, of every kind, which might accrue to me from said sixteenth part; this assignment being made agreeably to a promise by me made to said *Worthington* on, &c. In witnesses whereof," &c. On the same 31st of May, the defendant, having possession of said assignment, but not having then or ever since recorded the same in the office of the secretary of state, executed the following instrument, under his hand and seal, on the same paper, *viz.*: "Know all men, that I, *Erastus Worthington*, of, &c., in consideration of 200 dollars, paid me by *Joseph Morrill*, of, &c., have and do hereby transfer, assign, and set over, to said *Joseph*, and to his assigns, all the right, title, and interest, I have in the above assignment, which is one sixteenth part of *John Hatch's* patent file-machine for cutting files; this assignment being made according to an agreement which I have heretofore made with the said *Joseph*," as a further assignment and transfer of all his interest in the said patent right to the plaintiff; and then offered to deliver the same to the plaintiff, as a performance of the covenant set forth in the declaration, which was

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in a reasonable time; and has ever since been ready to deliver the same to the plaintiff; but the plaintiff refused to receive the same.

If, on these facts, the Court should be of opinion that the plaintiff was entitled to judgment, the jury were to assess his damages; otherwise the plaintiff was to become nonsuit.

* *Metcalf*, for the plaintiff, contended that the instru- [* **392**]
ment tendered by the defendant was not a performance of his engagement, as it contained no covenant of warranty. *Hatch* may not have been the original inventor, in which case nothing would pass by the instrument, and the plaintiff would have paid his money without a consideration, and would still be without remedy. (1)

To have given a good title to the plaintiff, it was necessary that *Hatch's* assignment should first have been recorded in the office of the secretary of state, as required by the law of the *United States* on this subject. (2)

Fuller, for the defendant. In every transfer or conveyance of personal chattels, there is an implied warranty that the vendor has a property in the thing conveyed.

The statute of the *United States* does not require the recording of transfers of these patent rights until the whole right is assigned. (3)

Per Curiam. The question is, whether the deed tendered by the defendant was a sufficient performance of his covenants alleged in the declaration.

The first objection insisted on is, that the deed contained no covenants of warranty. The defendant covenanted that he would make a transfer to the plaintiff, in as full and ample a manner as *Hatch* had engaged to do to the defendant; and it appears that he has tendered a deed in which he has conveyed the title in as full and ample a manner as *Hatch* had in fact conveyed it to him. He did all that he was bound to do; all that *Hatch* had done or engaged to do to him. The case of *Lassels* vs. *Catterton*, which was cited for the plaintiff, stands on different grounds. That was a covenant to make such conveyance as counsel should advise; and the allegation of the breach was, that the plaintiff had tendered such a conveyance, which was set forth at large; and it is there said that in such case usual covenants may be put in; but there must not be a warranty.

(1) 2 *Johns.* 613, *Clute* vs. *Robinson* — 5 *Mass. Rep.* 494, *Aiken* vs. *Sanford.* — 1 *Mod. Rep.* 67, *Lassels* vs. *Catterton.* — 1 *Sid.* 467, S. C — *T. Ray.* 190, S. C. — *Sugden's Law of Vendors*, 295, 373.

(2) *U. S. Laws*, 2 *Cong.* 2 sess. c. 11, § 4. — See, also, 8 *Mass. Rep.* 46, *Bliss & al* vs. *Negus.* — 1 *And.* 56.

(3) 6 *Cranch*, 324. *Tyler & al.* vs. *Tuel.*

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The other objection is, that the defendant should first have recorded *Hatch's* transfer, before he could legally [* 393] * assign it to the plaintiff. But we do not think the defendant was under such an obligation. It was for the plaintiff to register the transfer, as in cases of conveyance of real estate, which the purchaser always procures to be recorded.

Plaintiff nonsuit

Ex Parte WILLIAM DUNBAR.

This Court will not grant a *certiorari* to bring before them the proceedings of a court-martial.

HARRINGTON moved for a *certiorari* to bring up the proceedings of a general court-martial, which had passed a sentence upon the said *Dunbar*, an officer of the militia, by which he was aggrieved.

In support of the motion, *Harrington* argued from the powers vested in this Court by the statute establishing it. (1) Besides what is implied by the title of *Supreme*, given to the Court as well by the constitution as by the statute, and besides its general jurisdiction in civil and criminal causes given by the statute, there is expressly given to the justices authority, by *certiorari*, "to cause to be brought before them as well indictments, other criminal prosecutions pending in, as the records of sentences, orders, decrees, and judgments, of any court of inferior criminal jurisdiction, and to proceed, order, and award, thereon," &c. And by another clause of the statute, power is given to "issue writs of prohibition and mandamus, according to the law of the land, to all courts of inferior judiciary powers, and all processes necessary to the furtherance of justice and the regular execution of the laws." Courts-martial are created by statute, and are courts of inferior judiciary powers.

The general superintending power of this Court is the great protection of the citizens against the oppression of inferior tribunals. The exercise of this power, in cases like the present, will prevent the necessity of civil actions for damages, and will tend [* 394] to excite more * deliberation and caution in those courts. In every view of the subject, the expediency of the measure is apparent.

(1) *Stat.* 1782, c. 9.

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By the Court. This is an application of an entirely new impression. The inconveniences, which may be foreseen from sustaining motions of this kind, furnish, besides the total want of precedent, a strong argument against it. Parties who have legal ground to complain of the doings of these military courts have their remedy by action at law; and to that remedy they must be left.

Motion overruled.

COMMONWEALTH *versus* JAMES NEWCOMB, in Certiorari.

The master of an enrolled vessel, employed in transporting stones, &c., from one part to another of *Boston* Bay, and occasionally making a short trip to sea for the purpose of fishing, was holden not to be exempted from militia duty, as a mariner in the sea service.

THIS was a writ of *certiorari*, upon which were returned the proceedings had before a justice of the peace for this county, upon the complaint of a clerk of a company of militia, charging the respondent, *Newcomb*, with unnecessarily neglecting to appear at a muster of the company; for which offence the justice had adjudged him to pay a fine of two dollars.

It was agreed by the parties before the justice, that the respondent was lawfully subject to the fine, unless, from the following facts, which were admitted or proved, he was exempted from militia duty. At the time when the supposed neglect took place the respondent was master of a sloop, of the burden of thirty-three tons, duly enrolled and licensed; but which was solely employed in the transportation of stones, &c., from the towns of *Weymouth* and *Braintree* (both towns being within the collection district of *Boston* and *Charlestown*) to the *said towns [*395] of *Boston* and *Charlestown*; never going out of the said district, except on an occasional fishing trip, and returning in one, two, or three days, sometimes running several leagues without the lighthouse at the entrance of *Boston* harbor. In his said character, he had paid hospital money, or it had been paid for him by the owners of the vessel.

Metcalf, for the respondent, argued that he was exempted from militia duty by the act of Congress passed May 8, 1792, recited in the statute of this commonwealth of 1809, c. 108, as "a mariner actually employed in the sea service of a citizen or merchant within

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the *United States.*" In the case of *Pratt* vs. *Hall* in error, (1) the decision that the person claiming the exemption was not a mariner, within the intent of the statute, went on the ground that the vessel in which he was employed was under twenty tons' burden. Had she been of a suitable burden to entitle her to be registered or enrolled, as the vessel in the present case was, it is fairly to be inferred that the decision would have been different. (2) Here, too, it is found that the vessel went to sea on fishing voyages.

Chickering for the commonwealth.

PARKER, C. J. The provision, under which the respondent claims an exemption from duty under the militia laws of the *United States* and of this commonwealth, is thus expressed: "all mariners actually employed in the sea service of any citizen or merchant within the *United States.*" He claims to be such a mariner, on the ground that he is master of a vessel or lighter of thirty-three tons, enrolled and licensed, and as having paid hospital money.

The exemption is to be determined by the occupation of the person claiming to be a mariner, and not by the character of the vessel; for a small vessel may be enrolled, and hospital money may be paid for the very purpose of evading militia duty.

It appears that the respondent was not employed in the *sea service*, but only in the transportation of stones, &c., from
[*396] one part of the same district to another. *There is no difference in principle between this case and that of *Pratt* vs. *Hall.* For the difference in the size of the vessel, and the increased distance of transportation, cannot give an exemption, where the nature of the business is the same, and where it is not necessary to go beyond the bay, or out of the reach of common law jurisdiction, to pursue that business.

The case of fishermen would seem to require the exemption much more than those who are employed, like the respondent, in transporting stones from one river or inlet to another within the same bay; for the former are constantly upon the water, and cannot so well calculate their business on shore as the latter. But the legislature has refused this exemption to fishermen. For, by the statute of 1814, c. 63, they repealed the statute of 1810, c. 111, which secured this privilege to fishermen, considering them not as mariners employed in the sea service. Those fishermen who are employed in the bank fishery are probably to be considered as mariners, while actually engaged therein. But there seems

(1) 4 *Mass. Rep.* 241. (2) 4 *Mass. Rep.* 670

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to be no reason why the master of a small vessel, plying from *Braintree* or *Weymouth* to *Boston*, should be exempt, which would not in a great measure apply as well to teamsters who should carry on the same business in wagons and carts.

Proceedings affirmed. (*a*)

(*a*) [*Bayley* vs *Merritt*, 2 *Pick.* 597. — *Commonwealth* vs. *Douglass*, 17 *Mass. Rep.* 49. — ED.]

NATHANIEL MILLER *versus* THE INHABITANTS OF SOMERSET.

A surgeon, who had performed a difficult operation on a pauper, not resident in the town where he had his settlement, without the application of the overseers of such town, has no right of action therefor against the town.

THIS was an action of *assumpsit* by the plaintiff, a surgeon, and an inhabitant of *Franklin*, in this county, for a surgical operation performed on a pauper, having his settlement in *Somerset*; and it was submitted to the determination of the Court upon the following facts, agreed by the parties: —

* *Joseph Simmons*, the pauper, had his legal settle- [*397] ment in the town of *Somerset* at the time of the operation hereafter mentioned; and that town furnished him partial support, by paying his father, with whom he resided in *Rehoboth*, fifty cents per week, by agreement, towards his board, he being at that time a minor. The said *Joseph* had for many years labored under the malady of a stone in the bladder, and from this cause was very weak and much emaciated

In the month of December, 1812, on a consultation of several respectable physicians, it was their opinion that the only chance to preserve his life was speedily to perform on him the operation of lithotomy; which operation was the next day performed by the plaintiff. In the usual time, after considerable additional expense to the defendants, the said *Joseph* was relieved from his said malady by the said operation, and restored to health.

The day preceding the performance of said operation, application was made to the chairman of the overseers of the poor of *Somerset*, stating the opinion of the consulting physicians, and the necessity of the operation being speedily performed upon the said *Joseph*, and requesting the consent and aid of the overseers. But the said overseers refused to consent, or to do any thing about the matter, until the question should be laid before the town, and their opinion

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taken thereon, which the said chairman proposed to do at an ad journed town meeting thirteen days afterwards.

The selectmen of *Somerset* afterwards, by a letter to the plaintiff, stated that the town would not allow him any thing, but that they would make him a present of twelve dollars for his services on that occasion, as an act of humanity for the relief of the boy.

The plaintiff travelled from his home, in *Franklin*, thirty-five miles, to perform said operation, at the request of a brother of the pauper, there being no physician or surgeon in the town of *Somerset* who was accustomed to perform operations of this kind.

If, upon these facts, the Court should be of opinion
[*398] * that the plaintiff was entitled to recover in this action, the defendants were to be defaulted, and the plaintiff's damages to be settled by referees; otherwise the plaintiff was to become nonsuit.

Hastings, for the plaintiff. The defendants probably rely on the decision in the case of *Mitchell* vs. *Cornville*; (1) but the present case stands on distinct ground from that. In that case, any person might have furnished the relief as well as *Mitchell*. But in the present case, none but a surgeon could have performed the operation, and the case finds that there was no competent one in *Somerset*. In that case, it seems to be granted that *Mitchell* might have had his remedy against the adjoining town of *Garland*. But in the present case, the pauper was virtually resident in *Somerset*, within the case of *Marlborough* vs. *Rutland*, (2) since he was supported under contract with that town.

It must be taken for granted that the legislature intended to make provision that every poor person in distress within the commonwealth should have the necessary relief. As, in the present case, there was no inhabitant of the town capable of affording it, the plaintiff is entitled to recover on the common principles of humanity, although the case may not be within the letter of the statute, or of any decision upon its construction.

If a case of this kind is inadvertently omitted in the statute, the plaintiff may entitle himself by the common law. At common law, the overseers are personally bound for the relief of casual poor as the towns are by our law; and in the case of *Simmons* vs. *Wilmott & Al.* (3) it was decided that, if a person, not a parish officer, takes care of a person coming within that description, and for whom the parish officers would be liable to provide, he shall recover against them the expenses incurred on such an occasion. Our

(1) 12 *Mass. Rep.* 333. (2) 11 *Mass. Rep.* 483. (3) 3 *Esp. Rep.* 91.

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statute makes no distinction between casual and other paupers. (4)

Richardson, for the defendants, did not rely wholly on the case of *Mitchell* vs. *Cornville*, although he thought it a strong case for the defendants. The plaintiff, to entitle himself to a recovery, must show an *express promise of the de- [*399] fendants, by their overseers, or he must bring himself within the provisions of the statute. He has proved no express promise, and the statute gives no action to one not an inhabitant of the town in which the pauper has his settlement, against such town. If the plaintiff was an inhabitant of *Rehoboth*, he might have a legal claim against that town; but under the circumstances of this case, the law has made no provision for him, and he is without remedy.

Hastings, in reply. This case of a necessary surgical operation is not within the provisions as to the relief of ordinary wants, and giving the right of action against the town where the pauper may be casually found. The overseers had no right to object to the performance of an operation immediately necessary to preserve the life of a human creature. It is most extravagant that it should be in their power, for the sake of saving a paltry charge upon their town, to cause a pauper's death with impunity, or tax others, of more humanity, for the means of preserving his life.

PARKER, C. J. The difficulty in this case is, that the statute of 1793, c. 59, which alone creates the obligation on towns to support poor persons lawfully settled therein, has provided no such remedy as this action contemplates. The right of action is given only to such towns as afford the relief pursuant to their duty, as prescribed in the ninth section of that statute, and to such inhabitants as may have furnished the relief, when the overseers of the town primarily or subsequently liable shall refuse.

This is a case probably not foreseen by the legislature, where a difficult operation is to be performed, and no skilful surgeon lives within the town in which the pauper resides, or within that in which he has his settlement.

It is an unfortunate omission. But it is not in our power to supply it. For towns are not liable, by the common law, to support paupers; nor does any promise arise in law; because there is no duty created, except what is prescribed by the statute itself.

Plaintiff nonsuit.

(4) 3 *B. & P.* 250, note. — *Bull N. P.* 147, *Watson* vs. *Turner*. — 1 *Selw. N. P.* 50, 51.

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*JAMES BEAUMONT *versus* ELIJAH CRANE.

One advancing money to the constructor of certain machines, to enable him to accomplish the same, under an agreement that the person so advancing his money should have a share in the machines equal to the advances so by him made, becomes thereby tenant in common therein with the constructor.

THIS action was *assumpsit* for money had and received. At the trial, which was had on the general issue before *Wilde*, J., at the last February term in this county, the plaintiff proved that one *Morse*, wishing to make two carding-machines, applied to the plaintiff, previous to the year 1816, for assistance and advancements to enable him to accomplish that object; and that the plaintiff thereupon advanced to him sundry materials for the construction of said machines, of the value of 80 dollars 50 cents, he, the said *Morse*, then agreeing that the plaintiff should have a share in the said two machines, equal to that amount in value. Afterwards, on the 2d day of January, 1816, the said *Morse* signed a written agreement of that date for securing the plaintiff in the property and possession of one of said machines, the other having been by him previously sold; and at the same time he authorized the plaintiff to sell said machine, and after paying himself for said advances, to pay over the remaining proceeds of such sale to said *Morse*. Whereupon the plaintiff gave to *Morse* a receipt in full for said advances.

At this time the said machine was in a house occupied by one *Wheatly*; no formal delivery of it was made; and it could not be removed from said place of deposit without taking it in pieces and considerably injuring it.

After these transactions, the said *Wheatly*, having a just demand against the said *Morse*, caused the said machine to be attached as *Morse's* property, and delivered his execution to the defendant, then sheriff of this county, with orders to levy the same on the said machine; in pursuance of which orders the defendant sold the same for 130 dollars. Previous to the said sale, the plaintiff gave notice to the defendant of his interest in the machine, and forbade him to sell his share therein; and after the sale demanded of him his share of the money, and requested him not to pay over any
[*401] part of the money to *Morse*. The defendant had * executions against *Morse* at that time to a greater amount than 130 dollars.

A verdict was taken for the plaintiff by consent of the parties; and if the Court shall be of opinion, on the above facts, that the plaintiff had any property in the said machine, or any right to the possession thereof, as a security or pledge for his advances made to

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Morse, judgment was to be entered on the verdict; otherwise the plaintiff was to become nonsuit.

T. Fuller, for the plaintiff. The weakest ground on which the plaintiff's right can be placed is to consider the machine as a pledge for the money advanced by him. To secure the lien in a pledge, a formal delivery is not always necessary; it is enough that it be placed within the control of the pledgee. The case shows this machine not to have been in the possession of *Morse*, and to have been accessible to the plaintiff. The case of *Jewett* vs *Warren* (1) was a much stronger case than the present, in this point of view; for there the administrator of the pledgor held the actual custody and possession of the chattels. The pledge, in that case, was for a preëxisting debt, or rather liability, and not so much to be favored as where the debt, as in this case, was incurred in creating the pledge itself.

But the machine, in this case, cannot be considered as a pledge, as it wants the essential character of being collateral security. Here *Morse's* debt was extinguished by the plaintiff's receipt in full, if, indeed, any had previously existed. That receipt, however, could not have been necessary, as the original agreement gave the plaintiff a share in the machines; and the writing was merely evidence of the limiting of the tenancy in common to one machine, which before extended to both. It was not a sale, as the plaintiff already held his interest in common with *Morse*. (2)

Further, if *Morse* had sold a share only, and retained the remainder, a delivery would not have been necessary; since he would have as much right, and, in point of value, a much larger share, than the plaintiff. But he * did not, in fact, retain [* **402**] the possession; and it is clear that the plaintiff had as well the power, as the right, to sell and transfer his interest in the machine. Still less was a formal delivery necessary, where the plaintiff's right commenced at the same time with *Morse's*; and there is no pretence that *Wheatly*, or any one else, gave credit to *Morse*, in consequence of the machine in question.

Chickering, for the defendant, argued that, whether this were considered as a pledge or not, the want of a delivery, and consequent possession on the part of the plaintiff, was fatal. (3) In the case of *Jewett* vs. *Warren*, the court said there was all the delivery which could have been usefully made of property of that nature. But that was not the case here. The transfer was a fraud on *Wheatly*;

(1) 12 *Mass. Rep.* 300. (2) 2 Lord *Raym.* 916, 917, *Coggs* vs. *Bernard.*
(3) 10 *Mass. Rep.* 308, *Allen* vs. *Smith.* — 2 *D. & E.* 587, *Edwards* vs. *Harben*, *Esr* — 1 *Atk.* 614. — 1 *Campb.* 332.

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as it prevented him, by his reliance on this property, as belonging to *Morse*, from resorting to other means for securing his debt. He was entitled to notice of the plaintiff's claim; and if the transaction was fraudulent as to him, it was so as to all.

PARKER, C. J. We are of opinion that, under the peculiar circumstances of this property, an interest passed to the plaintiff, without any manual delivery. The machine stood in the house of *Wheatly* for safe-keeping only Before the attachment at his suit, an agreement in writing was made, the purport of which was, that the plaintiff should have a property therein, in the proportion that the sum advanced by him would bear to the whole value. Of this the sheriff had notice before he sold on execution, and he is accountable to the plaintiff for the amount of his interest, which is ascertained by the verdict.

We come to this conclusion because the advance by the plaintiff, for the materials and expense of the construction of the machines, upon an agreement, entered into before the machines were made, that he should be secured by the ownership of a part of the machines, made him originally tenant in common with *Morse*; and the subsequent agreement in writing was nothing
[*403] *more than a confirmation of the first bargain, settling the whole interest of the plaintiff in the one machine, instead of both.

There are no circumstances in the case authorizing a suspicion of fraud; and the notice to the sheriff, before he sold, gave him an opportunity to obtain indemnity from the judgment creditor.

Judgment on the verdict

NATHAN POND *versus* AMOS POND.

A proceeding in the Probate Court, pursuant to an agreement between tenants in common, for partition of the estate, although incompetent to effect the partition, was held equivalent to a license from each of the tenants, that each might enter and occupy the part assigned to him by such intended partition, so as to protect him from the penalties of the statute of 1785, c. 62, until the commencement of legal process for partition, which was holden to be a revocation of such license.

THIS was an action of trespass, upon the statute of 1785, c. 62, for sundry penalties alleged to have been incurred by the defendant, for a violation of the provisions of that act.

The defendant pleaded the general issue, which was joined; and

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also a license from the plaintiff to cut down and carry away the trees mentioned in the plaintiff's declaration; which was traversed by the plaintiff, and issue joined thereon.

On the trial of these issues before *Wilde*, J., at the last February term in this county, it appeared that the defendant had, between June, 1812, and the day of the date of the plaintiff's writ, cut down and carried away several trees, on the close described in the declaration, which was a part of the land which descended to the plaintiff and defendant and their brothers and sisters, as children and heirs of *Benjamin Pond*, deceased, and which they held in common.

The defendant proved, and relied, in his defence, on the facts reported by the judge in the case of *Nathan Pond & Al., Petitioners*, vs. *Amos Pond & Al.*, and which are recited in the report of that case, ante, vol. xiii. p. 413.

The judge instructed the jury that, although the proceedings in the probate office, and the agreement of the parties in relation thereto, did not amount to a legal * partition of [*404] the estate, as was intended, yet they might be considered as a consent, by each party, that each might enter and occupy the part assigned to him by that division, and that those proceedings and agreement were a sufficient license and justification of all the cutting between June, 1812, and September, 1813, when the plaintiff presented his petition for partition; which petition the judge instructed the jury was a revocation of said license, and therefore that the trespasses, proved to have been committed afterwards by the defendant, were without justification.

The jury returned a verdict pursuant to the said instructions; and if they were right, the verdict was to stand. But if the Court should be of opinion that the proceedings in the process for partition were no revocation of the license, the verdict was to be set aside, and the plaintiff to become nonsuit; or if the Court should be of opinion that the proceedings in the Probate Court and the said agreement were, in law, no license or justification for any of the trespasses complained of, the parties agreed that the verdict should be altered, by adding 66 dollars 50 cents to the damages found by the jury, and judgment entered for the plaintiff, agreeably to the verdict thus altered.

Haven for the plaintiff.

Richardson for the defendant.

Per Curiam. Let judgment be entered according to the verdict

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JOHN ATKINS, Petitioner, &c., *versus* HENRY BEAN AND OTHERS.

An execution was extended on an undivided seventh part of a remainder in fee, the judgment debtor, in fact, owning but nine sixty-fourth parts; and it was holden sufficient to pass the debtor's estate.

THIS was a petition for partition, in which the said *John* alleges that he is seised of one eighth part of the
*405] * premises therein described, in common with the respondents, and prays to have the same set off to him in severalty.

The cause was submitted to the decision of the Court upon the following facts agreed by the parties: —

The Rev. *Joseph Bean*, grandfather of *Nancy Bean*, one of the respondents, and father of the other respondents, and also of *Cyrus Bean*, hereinafter mentioned, died seised in fee of the premises in December, 1784, leaving a widow and eight children, *viz.*, *Joseph*, *William*, *Henry*, *Cyrus*, *Horace*, *Elizabeth*, *Mary*, and *Sally*; and leaving a last will and testament, afterwards duly proved, and in which he devises his whole estate, real and personal, to his said widow, for her sole use and improvement so long as she should remain his widow; and at the expiration of that term he devises the same over, to be equally divided amongst his children, their heirs and assigns. He appoints his widow sole executrix, and authorizes her to sell and dispose of so much of his real or personal estate as she should think best, as should enable her to discharge all his just debts.

Joseph, the said testator's eldest son, died in 1789, being more than twenty-one years of age, intestate and unmarried.

William, the second son, died in 1802, leaving the said *Nancy* his only child and heir.

In the year 1808, one *Marshal Spring* recovered a judgment against the said *Cyrus Bean*, for the sum of 286 dollars, and caused his execution thereon to be extended on *one seventh* part of the premises described in the petition; the said *Cyrus* and his mother, the widow of the said testator, being then both in full life.

[A copy of the execution, and of the return thereon, came up in the case. The appraisers describe the whole premises by their metes and bounds, and they appraise and set off one undivided seventh part thereof to the creditor. The officer returns that he extended the execution on the same estate, and that he set it out to the creditor in part satisfaction of the execution. Neither the appraisers nor the officer describe the nature of the
[*406] * debtor's estate in the premises, nor mention the estate

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of the widow therein. The officer does not certify the delivery of seisin; but an attorney of the creditor acknowledges himself to have received seisin and possession from the officer.]

The said *Cyrus* died unmarried and intestate in 1815, and the said widow of the testator in 1816.

If, upon the facts stated, the Court should be of opinion that the said *Cyrus*, at the time of extending said execution, was so seised of one seventh part of the said premises, as that the same could be taken in execution, and that the doings of the appraisers and officer relative to the same were sufficient to pass the same, it was agreed that judgment for partition should be rendered, and that the proportion which legally passed to said *Spring* by the said extent should be set off to the petitioner; otherwise the petitioner was to discontinue his petition.

A. W. Fuller, for the respondents, argued that the remainder, which was to be divided among the testator's children after the death of the widow, was limited to the children who should survive her; and that *Cyrus*, dying before his mother, took nothing.

The taking of real estate upon execution being unknown to the common law, and wholly depending on statute provisions, the statutes must be strictly complied with. The statute requires certainty, and that the estate levied upon should be set off by metes and bounds; neither of which could be complied with in this case. If any one of the children should die before the widow, the estate of the survivors would be increased. The extent of an execution on part of the estate of a tenant in common by metes and bounds is void. (1) If the extent of this execution had been on the land of *Cyrus Bean*, and after the extent some of the other children had died, living the tenant for life, the share of *Cyrus* would have been increased, and he would have had a remnant, to be divided to him on the death of his mother; which would cause an inconvenience similar to that of taking part of the estate of a tenant in common.

*If *Cyrus* took an immediate estate at the death of [*407] the testator, it was an eighth part; and on the death of his brother *Joseph*, he took one eighth part of his share, and thereby became seised of nine sixty-fourth parts. The extent is of nine sixty-third parts, a portion which *Cyrus* never had.

Other objections to the extent are, that no notice is taken of the particular estate of the widow; and a present estate was set off to the creditor instead of a remainder; that the officer does not certify

(1) 12 *Mass. Rep.* 348, *Bartlet* vs. *Harlow*.—13 *Mass. Rep.* 57, *Baldwin* vs. *Whiting* & *Al*

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that he delivered seisin to the creditor, without which the title to the estate is not affected. (2) The receipt of the attorney is of no avail, unless recognized by the officer. (3)

If the Court should be of opinion that the petitioner is entitled to a less share than by his petition he has claimed to have, the respondents are entitled to costs.

Richardson for the petitioner.

Per Curiam. *Cyrus Bean* had, by virtue of his father's will, a vested remainder in the estate; his mother having only a life estate, with a power to sell in fee; which being never executed, the remainder was not disturbed; and this estate was liable to extent by execution for the debts of *Cyrus*. (4)

The levy upon the debtor's undivided estate in common is good, and the estate sufficiently described. The error in the proportion owned by the debtor produces no mischief, as it comprehends the whole of his interest. The levy is good for an eighth, although it purports to be of a seventh. The mistake prejudiced none but the creditor; and perhaps he would have his remedy, by showing that part of the estate set off did not belong to his debtor. If one conveys by deed more land than he owns, the deed is good for what he does own. So if an execution be levied upon one hundred acres, and the debtor had a title but to fifty, the levy is good for the fifty; and the same reason applies where a similar mistake occurs in levying upon the estate of a tenant in common. The cases cited only show that the debtor's interest in an estate, holden jointly or in common with others, cannot be set off in any particular [*408] part of the *common estate. Here more than his interest in the whole was set off.

It is not necessary, although convenient, that the appraisers, or the officer in his return, should set forth the nature of the estate taken, or the estate of the tenant for life. All the right, title, interest, &c., of the debtor would pass the remainder, as in a deed.

As to the objection that the officer has not returned that he delivered seisin to the creditor or his attorney, seisin, in fact, could not have been given, as the life estate was then in being. But a constructive seisin may be presumed from the words of the return, *viz.*, that he extended the execution. It is also to be presumed, unless the contrary is made to appear, that the execution was returned by the officer, with the endorsement of seisin upon it by the

(2) 9 *Mass. Rep.* 96, 99, *Bott* vs. *Burnell.*—2 *Mass. Rep.* 154, *Eddy* vs. *Knap.*—11 *Mass. Rep.* 515, *Boylston* vs. *Carver.*—*Ibid.* 163, 165, *Bott* vs. *Burnell.*—4 *Mass. Rep.* 402, *Ladd* vs. *Blunt.*

(3) 8 *Mass. Rep.* 113, *Herring* vs. *Polly.*—7 *Mass. Rep.* 19, *Fowler* vs *Shearer*

(4) 13 *Mass. Rep.* 20, *Williams* vs. *Amory.*

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attorney of the creditor; and that is sufficient evidence that seisin was given, as required by the statute.

The petitioner can have partition but of nine sixty-fourth parts, which being less than he demands in his petition, the respondents must recover their costs. (*a*)

(*a*) [*Cutting* vs. *Rockwood*, 2 *Pick.* 443. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF MIDDLESEX, OCTOBER TERM, 1817, AT CAMBRIDGE.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. CHARLES JACKSON, } JUSTICES.
HON. SAMUEL PUTNAM, }

JONATHAN WALCUTT *versus* NELSON SPENCER.

If, pending a writ of entry, the tenant be ousted by a stranger having a better title, or the land is recovered against him by a stranger, the writ will abate; but in both cases the fact must be especially pleaded, as having occurred pending the writ, or since the last continuance.

THIS was a writ of entry, in which the demandant counts upon a mortgage. The action was submitted to the determination of the Court upon the following case agreed: The demandant, in the year 1806, mortgaged the demanded premises to one *William Walcutt*, to secure the performance of the condition of a bond executed by the demandant, and providing for the maintenance of the said *William* and his wife. Afterwards the demandant conveyed the premises to one *John Bellows*, subject to said mortgage, and took from the said *Bellows* the mortgage, upon which the present action is brought, as collateral security, among other things, for a bond to indemnify the

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demandant against his said bond to *William Walcutt*. Afterwards the said *Bellows* conveyed the demanded premises to the tenant, subject * to the aforesaid mortgage; and took [*410] from him a bond, conditioned, among other things, to indemnify the said *Bellows* against his said bond to the demandant, which is secured by the mortgage declared upon.

This action was commenced in the Circuit Court of Common Pleas, December term, 1814; and the said *William Walcutt* sued the mortgage made to him at the succeeding June term of the same court, and entered into possession of the demanded premises in November, 1815; when he, the said *William*, executed a lease thereof to the tenant for one year, from the 20th day of the same November, and the tenant continued in possession, claiming to hold by virtue of said lease, October, 1816, when the case was thus agreed and submitted.

If the Court should be of opinion that the above facts, or such of them as are by law admissible under the general issue, were insufficient to support the issue on the part of the tenant, he was to be defaulted. But if the Court should be of opinion that the said facts could have been so given in evidence upon the general issue, and that they amounted to a legal defence in this action, the demandant was to become nonsuit.

Hosmer, for the demandant, cited the cases of *Doe, ex Dem. Bristowe*, vs. *Pegge*, 1 *D. & E.* 760, note (*a.*) — *Evans* vs. *Prosser*, 3 *D. & E.* 186. — 1 *Saund.* 320, *Pordage* vs. *Cole, in notis.* — 2 *Ca. Ch.* 244.

Hoare, for the tenant, contended that the authorities cited did not reach the case at bar, having no application to the case of a mortgagee, or of any claiming under him.

JACKSON, J., delivered the opinion of the Court. In the writ of entry at common law, if the tenant is ousted, pending the suit, by a stranger having a better title, this will abate the writ. (1) So if the land is recovered against him by a stranger, unless the recovery is by collusion. (2) But in both cases the fact must be specially pleaded, as having occurred pending the writ, or after the last continuance. It resembles the common plea of non-tenure, and cannot be given in evidence under * the general [*411] issue. In our practice, non-tenure may perhaps be pleaded in bar; but still it must be specially pleaded, if the party would take advantage of it.

It is also very questionable whether this matter, if duly pleaded would have availed the tenant in this action; which is founded

(1) *Com. Dig.*, tit. *Abatement* H, 56. (2) *Ibid.* H 54.

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upon our statute for foreclosing the right of redemption upon a mortgage. If the party sued claims to hold the land by any title independent of the supposed mortgage, the title may be tried as in a common writ of entry; as, if, in the present case, some stranger had claimed the land by a title older and better than that of any of the parties here named, and had duly conveyed all his estate to *Spencer*, the latter might rely on that title alone; and if he could show it to be the better, he would prevail in the suit. But when the party sued has no title but as mortgagor, or as assignee of the right of redemption, and does not set up any other title in his defence, the action assumes a different shape, and becomes, in effect, a bill in equity to foreclose the right of redemption. The principal difference between the process in this point of view and the proceedings for the like purpose in the *English* courts is, that here our statute fixes the time within which the defendant shall pay the sum found due on the mortgage, in order to prevent the foreclosure, instead of leaving it to be limited in such case by the courts.

Now, when the action assumes this shape, the object and effect of it is to ascertain what sum is due on the mortgage, and to foreclose and bar the defendant's right of redemption, unless he pays that sum within the time prescribed. So far as regards that question, it seems unimportant to inquire what estate the defendant has in the premises. At least, if he has the right of redemption, which is sought to be foreclosed, he must be a proper party to the suit.

In the case at bar, it is obvious that *Spencer*, after the recovery against him by *William Walcutt*, still had the right to
[*412] redeem the premises, as against both of the * mortgagees.

It has been decided in this Court that, where a reversion, after an estate for life, is mortgaged, an action like the present may be maintained against the mortgagor, although the tenant for life is still living, and of course the defendant in the action is not tenant of the land. (3) There seems to be no more objection to maintaining the action, when the defendant has only a right of redemption upon a preceding mortgage. A recovery by the demandant in this case will not prejudice *William Walcutt*, who is not a party to the suit; but he may still hold the land in virtue of the mortgage to him, until redeemed by the demandant, or by some person claiming under him.

But, without relying on this point, the first is conclusive. This matter could not be given in evidence under the general issue; and, according to the agreement of the parties, the tenant must be called.

Tenant defaulted

(3) 13 *Mass. Rep.* 429, *Penniman* vs. *Hollis.*

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JEREMIAH WETHERBEE *versus* GEORGE JOHNSON AND THREE OTHERS.

The provision of the act of the Congress of the *United States*, passed March 3, 1815, that, after final judgment in any state court in an action for any thing done, or omitted to be done, by the defendant, as an officer of the customs, it shall be lawful for either party to remove and transfer such decision, by appeal to the Circuit Court of the *United States* in the same district, is not warranted by the constitution of the *United States*.

THIS was an action of trespass against *Johnson* and three others, for taking and carrying away from the possession of the plaintiff certain goods and chattels, *et alia enormia*, &c.

The defendants pleaded the general issue severally, *Johnson* reserving liberty to give evidence in justification of the act complained of, as an inspector of the customs for the district of *Boston* and *Charlestown*, and claiming to act under the authority of a statute of the *United States*, passed March 3, 1815, entitled "An Act further to provide for the collection of duties on imports and tonnage," which prescribes certain duties * to that [*413] officer. Two others of the defendants reserved liberty to give evidence in justification, as the aids or assistants of the said *Johnson*, in the execution of his said office; the remaining defendant making no reservation at all.

Trial was had upon the said issues, which were joined by the plaintiff, before *Jackson*, J., at the sittings here after October term, 1815; and a verdict was returned against all the defendants, and damages assessed; and judgment was rendered on the verdict, no question of law having been reserved by the judge who sat at the trial, and no exceptions filed by the defendants.

Afterwards, at the same term, the defendants filed their claim of an appeal from the said judgment to the Circuit Court of the *United States*, next to be holden within the district of *Massachusetts*; and the judge suspended further proceedings until the right to such appeal should be decided by the Court. The action stood continued to the last October term, for the consideration of the said claim, when

Fuller, for the defendants, cited and relied on the law of the *United States* above mentioned, (1) by the sixth section of which it is, among other things, provided that "It shall be lawful in any action or prosecution which might then be pending, or thereafter commenced, before any state court whatever, for any thing done, or

(1) *Stat.* 13 *Cong.* 3 sess. c. 93, § 6.

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omitted to be done, by the defendant, as an inspector or other officer of the customs, after final judgment, for either party to remove and transfer, by appeal, such decision during the session or term of said court at which the same shall have taken place, from such court to the next Circuit Court of the *United States*, to be held in the district in which such appeal shall be taken in manner aforesaid."

Fay, for the plaintiff, contended that this provision of the law was beyond the legitimate powers of Congress. By the constitution of the *United States*, the judicial power is limited to certain specified subjects, none of which comprise the present action, which is simply an action of trespass *de bonis asportatis*, given by [*414] the common * law, all the parties being citizens of this commonwealth. The plaintiff, having sustained an injury from some of his fellow-citizens, applied to the courts of the state for the redress to which he should be entitled; and he has obtained a verdict and judgment, conformed to the laws of the commonwealth. If he is liable in this manner to be deprived of the fruits of his judgment, and the doings of the highest tribunal in the state are thus to be vacated, and holden for nothing, at the pleasure of a discontented party, the time may not be far off when, under one pretence or another, the courts of the state will be ousted of all their jurisdiction.

The act of Congress, giving this right of appeal, was enacted after the commencement of the present action; and, if allowed to have effect in this case, will be an interference with the private rights of citizens unknown to the jurisprudence of any free government, and in a high degree oppressive. The act has now expired, and the Circuit Court, to which the appeal is claimed, cannot take cognizance of the suit.

This provision being in derogation of the common rights of the citizens, it ought to receive a strict construction. All the defendants have not attempted to justify under the laws of the *United States*. One has simply pleaded the general issue. But the verdict is against them all.

If the defendants would have entitled themselves to the benefit of this provision, they should have claimed it at the first term after the law was enacted. It is adding unnecessary hardship, to suffer the plaintiff thus to proceed to the final issue of his cause, with the addition of costs continually growing, and then to take from him the whole fruits of his labor and expense. But perhaps the language of the act is too imperious to allow much weight to this particular objection.

By the ninth article of the amendments to the constitution of the

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United States, it is expressly declared that "No fact tried by a jury shall be otherwise reëxamined in any court of the *United States*, than according to * the rules of the com- [*415] mon law." The carrying of actions by appeal from one court to another is a proceeding certainly not according to the rules of the common law.

Fuller, in reply. By the first section of the third article of the constitution of the *United States*, the judicial power is to extend to all cases in law and equity, arising under the constitution and laws of the *United States*; and this under such regulations as the Congress shall make.

If, then, this law is within the constitutional powers of Congress, it is very clear that the case at bar is within the law, for it includes in express terms any action then pending. The justification shows the action within the statute, although the declaration did not. The plaintiff had a right to bring his action in the courts of the state; but he could not thereby deprive the defendants of their right to a trial in the courts of the *United States*.

One of the defendants not claiming the rights the law had given him, cannot operate to deprive the others of their rights. If one of them has the right, and chooses to exercise it, this must carry the whole action; for there can be no division of it. But by the same statute, a defendant has a right to this special defence and justification, under the general issue simply.

Although the statute has now expired by its own limitation, it must still be sufficient to justify any acts done pursuant to it while it was in force.

The article of the amendments cited is intended exclusively to regulate the proceedings in the courts of the *United States*, and has no application to the present subject. (2)

The opinion of the Court was delivered at this term by

PARKER, C. J. An appeal from a judgment of the supreme tribunal of the state to an inferior tribunal of the *United States* would be an anomaly in judicial proceedings; and no such process has ever been supposed to exist, before the passing of the act on which * this appeal is claimed, which was [*416] during the pendency of this action. But as the act expressly provides such a remedy, for a party supposing himself aggrieved, by a judgment in a suit commenced against him, for any act done by him under color of his office, as inspector or other officer of the customs, we cannot deny him the privilege, if the statute is warranted by the constitution of the *United States*.

(3) 6 *Cranch*, 313, *Durousseau* vs. *The United States*

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Among other things referred, by the constitution of the *United States*, to the judiciary power of the nation, are all cases in law and equity arising under the constitution or laws of the *United States*. If an action be brought by a citizen of any state against another citizen of the *same state*, the courts of the *United States* have not original jurisdiction; but the action must be brought in the state courts. But as the defendant in such suit may, in the act complained of, have been in the execution of some law of the *United States*, Congress may by law provide that the suit shall be removed to the national courts, when the defendant shall make it appear that his case is a proper subject of their jurisdiction, provided he seasonably require it.

Before the statute of March 3, 1815, but two modes existed by which the removal of a cause so circumstanced could be effected. These were both established by the first judiciary act, passed September 24, 1789. The first mode, which is the most convenient and the least exceptionable, was made applicable only to the cases of an alien, or citizen of another state, being defendants. If they are sued in a state court, they may, at the time of entering their appearance, file a petition for the removal of the cause for trial into the Circuit Court; and the court to which the process is returned, upon satisfactory proof that the defendant is an alien or citizen of another state, upon taking sureties for the prosecution of the action in the court to which it is removed, are required to stay all further proceedings. This provision could be easily executed: it saved the jurisdiction of the state court, if the defend-
[*417] ant * submitted to a trial; and the judgment rendered was left undisturbed.

The same process of removal might have been provided for all other cases of which the state courts have original jurisdiction, and in which questions may arise over which the judicial power of the nation has cognizance according to the constitution, and much doubt and difficulty would have been saved thereby.

But it was thought proper to provide another mode for the exercise of jurisdiction, by the supreme national tribunal, over questions incidentally arising in a state court, which are, by the constitution, subjects of national jurisdiction; and this is to remove the record by writ of error into the Supreme Court of the *United States*. To carry this into effect, some error existing in the record itself must be suggested. So that, unless it appear, by a bill of exceptions or otherwise, that a decision has been made upon some of the questions which are referred by the constitution to the national judiciary, no such process can lie.

Whether this mode of revising judgments of the Supreme Court

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of a state is justified by the constitution, has been a question of much doubt and argument; and the power claimed by the Supreme Court of the *United States*, under this section of the law, has been denied by the highest court of law in *Virginia*. The justices of that court think that it never was the intention of the constitution of the *United States* to consider the Supreme Courts of the several states as tribunals inferior to the courts of the *United States*; or that a privilege was given to a defendant, who had submitted to the jurisdiction of a state court, taken his trial there, and finally failed in his defence, to harass his adversary, by intercepting the remedy, which he may have obtained at great expense, and carrying his cause to a tribunal whose sessions would be at the seat of the national government, perhaps a thousand miles distant from the place of his residence.

Whether the court of the *United States*, or the court of *Virginia*, are right on this important question, the [*418] present case does not call upon us to decide.

In the act under consideration, the removal of a cause upon the petition of the defendant, alleging that the act done was in virtue or under color of his office, as inspector of the customs, is provided for; and it is also provided that either party, after judgment, may remove the cause into the Circuit Court by writ of error. The first of these two modes is similar to the provision respecting aliens, &c., in the first judiciary act. The second substitutes the Circuit Court of the *United States* for the Supreme Court, and provides for a trial of the facts, as well as the law, upon a writ of error — a proceeding before unknown in courts of justice.

But a third mode is also provided in the same act, which is the one under which the appeal in this case is claimed. The sixth section of that act provides that it shall be lawful, in any action pending, or afterwards commenced, before any state court whatever, for any thing done, or omitted to be done, by an inspector or other officer of the customs, for either party to remove and transfer, by appeal, such decision, during the session or term of such court at which the same shall have taken place, from such court to the next Circuit Court of the *United States*, to be held in the district in which such appeal shall be taken in manner aforesaid; and that it shall be competent for either party, within six months from the rendition of judgment in any such cause, by writ of error or other process, to remove the same to the Circuit Court aforesaid; and the Circuit Court shall proceed to try the law and the facts in the same manner as if the suit had been there originally commenced, the judgment in such case notwithstanding.

This sweeping clause undoubtedly comprehends the case now

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before us; so that the only question for us to decide is, whether Congress had authority, by the constitution, to enact it

[*419] * By this provision, the supreme tribunals of a state are considered, not only as inferior to the Supreme Court of the *United States*, which is not admitted in *Virginia*, but to the Circuit Courts, which are by the constitution and laws expressly made inferior courts of the *United States;* and if it be constitutional, Congress may authorize appeals to the District Court also; and if they should see fit to establish still inferior tribunals, they may provide for an appeal to, or a writ of error from, such courts, however low in the rank of judicial tribunal; giving them authority to reverse and annul the solemn judgments of what are called the supreme tribunals of a state.

This law was passed *flagrante bello*, and, we believe, without a due consideration of the independence of the state courts, and the national judicial power, as established by the constitution of the *United States*. By that constitution, (article 3d, section 1st,) the judicial power of the *United States* is vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish; and in the second section of the same article, it is provided that, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction; and in all other cases, of which they have jurisdiction, it shall be appellate, both as to law and fact, under such regulations as the Congress shall make.

Taking the constitution, in this respect, as it was originally formed and adopted, without reference to the amendments ratified before the first judiciary act was passed, we apprehend its true meaning to be, that none but the Supreme Court of the *United States* could entertain jurisdiction, by way of appeal from the judgments of the state courts, in cases originally cognizable and commenced in those courts; and that any act of Congress, giving such jurisdiction to any inferior court of the *United States*, would have been unconstitutional and void. Indeed, such a power

[*420] was never *supposed to exist; for the consequence would have been universally seen to be a prostration of the dignity, and with that the usefulness, of the state tribunals. The constitution would never have been adopted by any one state, under such a construction.

But even the appellate jurisdiction of the Supreme Court of the *United States*, in the general terms in which it is expressed in the constitution, was thought, by a majority of the states, to be an unnecessary, if not a dangerous, interference with the independence

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of the state tribunals, and as tending to vex and harass the citizen by a multitude of trials; the last of which would be remote from his place of residence, where it would be difficult, and sometimes impossible, for him to prove facts upon which his cause depended. Besides which, it infringed one of the most ancient and cherished principles of the common law, that the trial of facts should be in the vicinage where they happened.

For these reasons, an amendment was adopted, which is now an article of the constitution, as operative and binding as if it were a part of the original system. This amendment restricts the power, as described in the second section of the third article; and provides that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise reëxamined in any court of the *United States*, than according to the rules of the common law." Since the adoption of this amendment, the *appellate* power, even of the Supreme Court of the *United States*, can only be exercised over questions of law appearing on record. For the common law knows nothing of a reëxamination of facts once tried by a jury, except in cases of new trial, which can only be granted by the court before which the trial was; no such thing as an appeal being known in that system.

Admitting, then, that the Circuit Court of the *United* * *States* in the district of *Massachusetts* to be superior to [*421] the Supreme Judicial Court of *Massachusetts* — which can, however, be only admitted for argument — the constitution of the *United States* has expressly denied it the power of reëxamining a judgment founded on a verdict, by appeal, or in any other way than by writ of error, for some error in law arising on the record.

But the statute of March 3, 1815, provides that, after a trial by jury in the Supreme Court of the state, nay, it may be, after three trials, according to the organization of our state Courts, and the laws regulating them, and all this by the consent of the party against whom final judgment is rendered, he may still appeal to the Circuit Court, where he may have another trial by jury; and if he fails even there, he may be shielded from execution by the will of the judge who sits in the last trial. This is certainly not according to the rules of the common law, and cannot therefore, by the constitution, be within the power of Congress to establish.

This act of Congress was limited in its operation to one year from the time of its enactment, and it has expired. The defendant's motion was made while it was in force; so that they would be entitled to the privilege it gives, if it were ever binding upon the Court. Since it has expired, and probably will never be revived.

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we should willingly have avoided any discussion of its principles. It was undoubtedly passed under a belief that the necessity of the times required it; but no necessity can justify a judicial tribunal in executing an act which is not authorized by the constitution, when any citizen of the state claims his rights in opposition to it.

Motion overruled.

[*422]

*JOHN WINSLOW AND ANOTHER, Executors, Appellants, &c.

The lands of deceased testators are not chargeable with legacies bequeathed in any last will, unless such will be executed in the manner prescribed for devising real estate.

THIS was an appeal from a decree of the judge of probate for this county, by which the last will and testament of *Anna Winslow*, deceased, was approved and allowed, and a writing, purporting to be a codicil to the same will, was disallowed, because attested by two subscribing witnesses only, and not appearing to have been read to the testatrix in the presence of three credible witnesses.

The reason of appeal, filed by the executors, according to the statute, was that the said second instrument, not purporting to be a disposition of any real estate, but only giving certain pecuniary legacies, ought to have been approved and allowed by the said judge of probate, notwithstanding it was not read to the testatrix in the presence of, or attested by, three credible witnesses.

The opinion of the Court was delivered, at the last March term in *Suffolk*, by

JACKSON, J. It is admitted that the testatrix had some real estate, which would pass by the residuary clause in the will. The codicil not having been signed in the presence of three or more witnesses, cannot revoke nor alter that devise in the will; and it is for this reason, as we understand, that it was disallowed in the Probate Court. If the codicil could have that effect, we are satisfied that it ought not to be allowed. But we are of opinion that the codicil, if approved and allowed in the usual form, would not affect the previous devise of the real estate.

The codicil does not purport to dispose of any real estate; and the only mode in which it could be supposed to affect it is, that the executors might find it necessary to sell the real estate, or some part of it, to enable them to pay the additional legacies given

[*423] by the codicil. *This presents the question, whether the real estate can ever be taken from the heir, or the

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person who would otherwise be entitled to it, by virtue of any will or testamentary disposition, which is not executed in the manner prescribed by the statute for devising real estate; (1) or, in other words, whether an executor can, under our statutes, sell the lands of his testator, to pay legacies given in a will or codicil which is not so witnessed.

By the *English* laws, the real estate can never be charged for the debts of the testator, nor in any manner taken from the heir, unless the will be attested by three or more witnesses. The provisions of our statute are substantially the same. The devise of lands, mentioned in our statute of wills, before referred to, must include all charges on lands by last will. By the statutes regulating intestate estates, (2) all the lands of the deceased, which have not been legally devised, descend to his heirs. If, therefore, a charge for the payment of legacies is not virtually a devise of the land, it will have no effect in any case against the heir.

If this is not the true construction of the statute of wills, its provisions, as to the manner of devising lands, seem to be wholly nugatory, and may always be evaded. The ancestor, although he could not, by a will attested by less than three witnesses, devise the land directly to another, might give legacies to an amount equal to his whole estate, real and personal, and thus, in effect, take the whole from the heir.

It is true that the statute for the settlement of the estates of persons deceased, (3) authorizes a sale of the real estate when the goods and chattels are not sufficient to pay the just debts of the deceased, and the legacies bequeathed in his last will and testament. But the words of this statute may be fully satisfied, if its provisions are confined to such legacies as were by law payable out of the real estate. This is the case with all legacies given in a will which is executed in the manner prescribed for devising real estate; and this being the case which would most commonly occur, we * may presume it to have been in the view of the [* 424] legislature, in passing the last-mentioned statute. By the statute of wills, no instrument can be approved as a testament of personal estate only, if it purports to dispose also of real estate.

If this provision for the sale of lands for the payment of legacies should be construed to make legacies, in all cases, a charge on the real estate, it would virtually repeal the most important part of the statute of wills, which had been passed a short time before, at the same session of the legislature. It may be added, that, by the 7th

(1) *Stat.* 1783, c. 24. (2) *Stat.* 1783, c. 36. — 1805, c. 90.
(3) *Stat.* 1783, c. 32.

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section of the same statute for the settlement of the estates of persons deceased, the real estate of every testator or intestate is made liable to be taken in execution by the creditors of the deceased. But we find no such provision in favor of legatees, although the latter are allowed to sue for their legacies by an action at common law against the executor.

It appears to us, therefore, that the executor would not necessarily be authorized to dispose of the real estate, which was devised, in this case, by the will, to pay any of the legacies bequeathed by the codicil. But even if this were more questionable, it would not follow that the codicil ought to be wholly inoperative. As far as it concerns the personal estate, there seems to be no objection to the testator's altering, enlarging, or reducing, by the codicil and legacy given by the will, provided the devise of the real estate be not affected. Now, it cannot be known, at present, whether the personal estate of the testatrix in this case will not be sufficient to pay all her debts, and all the legacies bequeathed both by the will and the codicil.

It may also, in cases like the present, be often difficult to ascertain whether the legacies bequeathed by the codicil are of greater amount than those which had been bequeathed by the will, and which are revoked by the codicil; as, where the legacies are of different specific chattels, or when an annuity is given by the will, and a sum in gross by the codicil.

[* 425] * We therefore see no difficulty in allowing and approving this codicil; and if it should hereafter appear that the legacies given by the codicil cannot be paid, without disposing of some part of the real estate, which had before been devised by the will, the question, whether the real estate can be taken for the purpose, will come more properly before the Court. We have already intimated our views on that question; but it may be more fully considered, if it should be presented to us in another shape.

We give no opinion, at present, whether the will in this case created a virtual charge on the land, for the legacies therein bequeathed; and whether the legacies in the codicil come in under the same charge, according to the principle laid down in the case of *Windham* vs. *Chetwynd*, (4) and in *Masters* vs. *Masters*, (5) which were cited in the argument.

If the executors should hereafter apply for leave to sell any part of the real estate, to pay the legacies bequeathed in the codicil, it may be necessary to consider that question. The decree of the

(4) 1 *Burr.* 423 (5) 1 *P. Will.* 421

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judge of probate, disallowing the codicil, is reversed, and the same being approved and allowed in this Court, the case is to be remitted to the judge, for his further proceedings therein.

AARON EAMES *versus* EDWARD SAVAGE, Administrator, &c.

The statute of limitations may be avoided, when pleaded by an administrator to an action for money had and received by the intestate, &c., by evidence that the plaintiff paid money to the intestate, as a consideration for land, which the intestate promised to convey to the plaintiff, and of which he put the plaintiff into possession, that he never made such conveyance, and that the plaintiff has been evicted by persons claiming under the intestate within the time of limitation; whereby the consideration has failed.

But whether such a contract may be proved by parol evidence, *quære.*

ASSUMPSIT for 750 dollars, had and received by *Ebenezer Seaver*, the defendant's intestate, on the 10th * day [* 426] of October, 1809. The original writ was dated the 21st day of February, 1816. The defendant pleaded, besides the general issue, which was joined by the plaintiff, that the said intestate did not make the supposed promise within six years; and in a third plea, that the cause of action did not accrue within six years from the commencement of the suit.

The plaintiff replies to the second plea in bar, that the money mentioned in the declaration was paid to the defendant's intestate on the 10th of October, 1809, as the purchase money for a certain messuage and lot of land situate, &c., into the possession of which the said intestate then and there put the said *Eames*, and promised to make him a good and sufficient deed thereof, and failed so to do; and that he, the said *Eames*, from the day aforesaid until the 1st day of February, 1816, quietly enjoyed the same messuage and land, and on the same day was evicted therefrom by persons claiming under said intestate; and the consideration for which the said money was paid then and there failed; and that this action was commenced within six years from the time of his eviction aforesaid, and the failure of the said consideration.

The replication to the third plea in bar is, in substance, the same as the foregoing; and to each of them the defendant demurs specially, assigning the following causes, *viz.:* 1. Because the defendant has in his plea alleged a material and issuable point, *viz.*, that the said intestate never made the promise alleged, at any time within six years from the commencement of the plaintiff's action, and

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thereby tendered to the plaintiff a material issue, on which the merits of the cause might have been decided; but the plaintiff has not taken issue thereon, nor hath he traversed the same, but hath passed by and taken no notice thereof, neither confessing nor avoiding the same; and he hath, in his replication, set forth alleged certain facts, which it would have been competent for him to show in evidence under the issue tendered by the defendant; [*427] which tends to introduce * uncertainty, confusion, and unnecessary length of pleading. 2. Because it does not appear, from the said replication, what was the nature of the said supposed agreement between the plaintiff and the said *Seaver*, or what were the terms thereof, or whether it was binding on the parties. 3. Because it does not appear that the said *Seaver* was bound to execute a deed of the said messuage and land, or that he was ever requested by the plaintiff to make such conveyance, and refused so to do; nor does it appear whether the agreement was of such a nature that the defendant, in his said capacity, might not have executed the same. 4. Because it does not appear, in the said replication, in what manner the said *Seaver*, or his estate, were liable to answer for the act of persons claiming under him, nor why the estate of the said *Seaver* should be answerable for the eviction of the said *Eames*. 5. Because the said replication and the matter therein contained are informal, argumentative, and void in law.

The plaintiff joins in demurrer.

Thatcher, for the defendant, argued that the pleas, being given by the statute of limitations, (1) are a sufficient answer to the plaintiff's action; and that the statute alone can furnish a sufficient reply. The defendant has tendered an issue on a material fact, the decision of which would settle the whole question. It was the duty of the plaintiff to join the issue so tendered, if he meant to insist, as a matter of fact, that the promise was made within six years, or that the cause of action accrued within that time.

If the plaintiff meant to avail himself of the provisions or exceptions of the statute to avoid its operation, as that he was disabled from bringing his action, or that the defendant could not be sued by reason of any of the causes which are contained in the statute, he should have replied such matter specially. (2)

In the case of *The Mayor, &c., of Oxford* vs. *Richardson & Al.* (3) it is settled that, whenever the point in question is [*428] traversed by one party, the other must take * issue upon it; for the parties are not to go on *in infinitum*.

(1) *Stat.* 1786, c. 52.
(2) 1 *Chitty on Pleading*, 554. — 2 *Chitty*, 604.
(3) 4 *D. & E.* 437.

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Ward, for the plaintiff. Whenever the statute of limitations is pleaded, the matter relied upon to take the case out of the statute must be specially pleaded. (4) The replication introduces new matter in avoidance of the bar with an averment. The plaintiff could not have availed himself of this matter, had he joined the issue tendered by the defendant.

If the agreement stated in the replication had been binding, the present action could not be maintained; and it appears, from the statement of it, that it was such as the defendant could not have been compelled to execute.

The replication, as to its merits, is within the reason of the decision in *The First Massachusetts Turnpike Corporation* vs. *Field & Al.*, (5) that fraud is a good replication to a plea of the statute of limitations. The presumption of payment, which is the ground of the statute, can have no place here upon the facts disclosed in the replication.

Per Curiam. The result of all the facts stated in the replications to the pleas in bar in this case is, that the cause of action accrued to the plaintiff within six years; and the plaintiff should have joined the issue, if he was well advised that the contract set forth might be proved by parole, of which we now give no opinion. The contract was broken, because the intestate did not make the deed in his lifetime; for no time being fixed, he had his life to fulfil the contract, unless the plaintiff had demanded a performance, and been refused.

As the plaintiff, if entitled to this evidence at all, would have been entitled to it on the trial of the issue tendered by the defendant, and as the latter has assigned this as a cause of demurrer, the replications are adjudged bad.

Ward had leave to amend his replications, on paying the costs arisen since the demurrers were filed. (*a*)

(4) 2 *Sellon's Practice*, 468.
(5) 4 *Mass. Rep.* 201. — See, also, *Doug.* 655. — *Bree* vs. *Holbeck*, 1 *P. Will.* 143
(*a*) [*Thomson* vs. *Gould*, 20 *Pick.* 124. — ED.]

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*JAMES PRESCOTT, Judge, &c., *versus* JONATHAN PARKER AND OTHERS.

No action lies on a bond given by an executor for the faithful execution of his trust for the benefit of a legatee, to whom a personal legacy is bequeathed, and payable at a day certain, until after a demand of the legacy by the legatee upon the executor.

THIS was an action of debt on a bond given by the defendants to the plaintiff, as judge of probate for this county, conditioned for the faithful execution, by the said *Jonathan*, of the trust of executor of the last will and testament of *David Parker*, deceased.

The defendants pleaded in bar, that the action was brought and prosecuted for the sole use and benefit of one *Ebenezer Parker*; and that the said *Ebenezer* is not entitled to get any part of the estate of the said testator, nor had he any interest, claim, or demand, in or upon the said estate, or upon the said *Jonathan*, as executor as aforesaid, excepting a certain legacy of one hundred dollars bequeathed to him, the said *Ebenezer*, in and by the said last will and testament; which said sum the said testator required the said *Jonathan*, executor as aforesaid, to pay to said *Ebenezer* in one year after the said testator's decease; and the defendants aver that the said executor has always been ready to pay and deliver to him, the said *Ebenezer*, the said legacy, according to the testator's said direction in his said last will; but that the said *Ebenezer* has never made any demand or claim of or for the said legacy, of or from the said *Jonathan*, executor as aforesaid.

To this plea in bar the plaintiff demurred generally, and the defendants joined in demurrer.

Locke was to have opened the demurrer for the plaintiff, but the Court called on

Hoare, for the defendants, who argued that, to support this action, instituted for the benefit of a legatee, a demand of the legacy upon the executor must be proved. The statute, in case of a bond given by an administrator, expressly requires that, in a suit on such bond, either for a creditor or for one entitled to a distributive share of the estate, a demand upon the administrator shall be

[*430] *proved. It is also provided, in the same section of the statute, that "the like proceedings (so far as they can with propriety take place) are to be had upon bonds of executors,' &c. (1)

It is the proper duty of the legatee to demand his legacy, or at

(1) *Stat.* 1786, c. 55, § 2.

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least to put himself within reach of the executor. He may be in a place unknown to the executor; or, as is the fact in the case at bar, he may be indebted to the testator's estate, to an amount exceeding that of the legacy. It seems monstrous that, in such cases, the executor and his sureties should be held liable to a judgment for a penalty equal to the whole property of the testator. Although, by statute, (2) "A person having a legacy given in any last will, may sue for and recover the same at the common law," it is only after certain acts performed by the person having a claim upon an administrator or executor, that an action can be maintained on the probate bond.

Prescott, pro se. The statute, which gives the action at common law for a legacy, does not require a previous demand on the executor. The remedy given on the probate bond is cumulative, and is to be decided upon the same principles as the action at common law for the legacy.

The cases, in which, by the statute, certain previous acts are required on the part of the party instituting the demand, are such as require a previous adjustment, to ascertain the amount actually due, except only the neglect to return an inventory. But where a sum certain is bequeathed, no previous adjustment is required; and it is a breach of the executor's duty to secure the performance of which the bond is made, if he does not pay such legacy at the time prescribed by the testator, or on demand after a year, if no time of payment is prescribed. It is as incumbent on the executor to look up the legatee and tender him his legacy, as it is on a debtor to seek his creditor, and tender him his debt.

In the case of *Paine*, J., vs. *Gill & Al.* (3) the court said that the bond of an executor is taken expressly for the security of a legatee; and that it is only to the case * specified in the statute that the mode of adjustment there provided is to apply. [*431]

Per Curiam. The question which this case presents is, whether an action can be maintained upon a bond given by an executor and his sureties to the judge of probate, for the faithful execution of the trust of executor, for the use and benefit of a legatee having a pecuniary legacy given him by the will of the testator, payable at a day certain, without proof of a previous demand. And we are all of opinion that such demand must be shown. From analogy to other cases where a demand is required, although it is not in this case expressly made necessary by the statute, yet we think the intention of the legislature may be presumed, that the executor

(2) *Stat.* 1783, c. 24, § 17. (3) 13 *Mass. Rep.* 370.

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should not be liable to an action on the bond, until he was notified by a demand that the legatee intended to claim the legacy. Until such a demand, the executor cannot be reasonably said to have been guilty of a breach of his trust, or even of a neglect of duty.

The legacy being made payable at a fixed time, makes no difference as to this question. Whether, in such a case, a previous demand would be held necessary to support the action for the legacy given by our statute, has not been determined; nor is it necessary to decide that question in the present case. It seems to us, however, on general principles, that it would be considered an essential point in the case supposed.

In the case before us, the defendant's plea in bar is adjudged good.

BENJAMIN RICE AND LUCY HIS WIFE *versus* PETER SMITH.

A decree of the judge of probate, allowing the return of commissioners for dividing the real estate of an intestate among his heirs, &c., and who had assigned the whole to one, she paying to the other heirs respectively a certain sum, although void as to one of the heirs who had no notice, was held good as to another, who had assented to the assignment, and had received the sum awarded to her by the commissioners.

THIS was a writ of right, in which the said *Benjamin* and *Lucy*, in her right, demanded six several parcels of land described in their writ.

[* 432] * The tenant pleaded the general issue, which, being joined by the demandants, was tried before *Wilde*, J., at the sittings here after the last October term.

It was proved or admitted, at the trial, that one *Israel Smith* was seised of the demanded premises in fee, and died so seised and intestate in the year 1802, leaving no issue; but leaving a brother, the said *Peter*, and three sisters, of whom the said *Lucy* is one, and *Abigail Smith*, his mother, his only heirs; that the whole of said lands were assigned to the demandants in March, 1804, by a decree of the judge of probate for this county, in the manner stated in the report of the case of *Smith* vs. *Rice*, (ante, vol. xi. p. 507,) except that the demandants were directed by said decree to pay to the said *Abigail* the sum of 531 dollars 51 cents, as to the other heirs as therein stated; and the said sum was accordingly paid by the demandants to the said *Abigail*, who received the same, and thereupon certified her assent to the said assignment; that the said

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Abigail afterwards died, leaving the said *Peter* and *Lucy* and their two sisters her children and heirs at law; and that after this the said *Peter* recovered judgment, in a writ of entry against the demandants, for an undivided *fourth* part of said premises, and has ever since continued to hold the same.

On these facts the demandants contended that the tenant had no right to hold more than a *fifth* part of the said premises, and that said *Abigail's* share passed to the demandants by the said decree of the judge of probate, and her assent thereto; and therefore they claimed a right to recover of the said *Peter* one *twentieth* part of the said lands; thereby reducing the said *Peter's* share from one fourth to one fifth part.

The tenant contended that the decree of the judge of probate was merely void; that it was against the provisions of law, as decided in the said case of *Smith* vs. *Rice;* and that said *Abigail's* assent could not give jurisdiction to the judge of probate, or render the proceedings in the Court of Probate valid, so as to pass said *Abigail's* share to the demandants.

*But the judge, being of opinion that the proceed- [*433]
ings in the Probate Court were voidable only, and that the said *Abigail's* assent to them was sufficient to render them valid in respect to her share, instructed the jury accordingly; and they returned a verdict for the demandants for an undivided twentieth part of said land.

If this opinion should be deemed correct by the Court, judgment was to be rendered for the demandants, agreeably to the verdict; otherwise the verdict was to be set aside, and the demandants were to become nonsuit.

Prescott, for the tenant, argued that the assignment by the judge of probate, having been found void as respected the said *Peter,* was void in the whole; and *Abigail Smith* thus having been seised of one fifth part of the land by inheritance from her son, her right had descended to the tenant and his sister, upon her dying intestate, one fourth part of which appertained to the tenant. If this should be contested on the ground that *Abigail's* assent to the decree of the judge of probate may be considered as a conveyance of her purparty to the demandants, the answer is, that such a conveyance is void by the statute of frauds.

Hoare, for the demandants. The decree was held to be void in the decision of the former action, as it respected the tenant, because he had no notice of the proceedings. But *Abigail Smith* not only had notice, but she certified her assent to the decree, and received the money awarded her as an equivalent for her share of the

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land. As to her, then, the judge had jurisdiction; and if his judgment was wrong, her only mode of avoiding it was by appeal.

Per Curiam. On the trial of the former action between these parties, it was not known, or at least it was not proved, that *Israel Smith* had a mother living at his death. If this fact had appeared at that trial, it might have saved the parties the expense of the present action.

It is now said that the partition or assignment in the Probate Court, being void in part, is void in the whole;
[*434] *and that therefore *Abigail Smith's* right to one fifth part descended, at her decease, to all her children. If so, *Peter Smith* is entitled to one *fourth* part, which he formerly recovered.

But we are satisfied that the proceedings in the Probate Court were valid and effectual as to *Abigail's* share. The avoidance of it as to *Peter* has no effect whatever as between *Rice* and the other heirs. Their respective proportions, whether of land or money, remain the same; and none of them are prejudiced in any manner by the mistake or error as to *Peter*.

Abigail received the money awarded to her, and certified her assent to the assignment. This is equivalent to direct evidence that she was notified of the proceedings; and is, indeed, stronger than such evidence; because, instead of an implied and tacit assent, it shows an express agreement, and a waiver of all objections to the proceedings. If the heirs had all joined in a deed for the conveyance of the premises to *Rice* and his wife, and afterwards the deed, as it respected *Peter*, had been avoided for duress or insanity, &c., it might as well be said that this would avoid it also as to the other grantors. (*a*)

Judgment according to the verdict.

(*a*) [*Newell* vs. *Sadler*, 16 *Mass. Rep.* 132. — ED.]

STEPHEN BARNARD *versus* ELEAZAR POPE.

How far the declarations or confessions of a party are competent evidence in the trial of his right to real property.

Of the seisin necessary to maintain a petition for partition.

[Declarations of a party as to his title upon the faith of which no person has acted, are not conclusive where his title is clearly proved. An actual corporeal seisin of a tenant in common is not necessary to maintain a petition for partition: a constructive seisin is sufficient, there being no proof of an ouster. — ED.]

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BARNARD *vs.* POPE.

THIS was a petition for partition, in which the petitioner claimed an undivided tenth part of the premises, and prayed that the same might be set off to him, to hold in severalty.

The respondent pleaded that he was sole seised of the said premises, and traversed the seisin of the petitioner, whereupon issue was joined.

Upon the trial of this issue, which was had at the sittings here after the last October term, before *Wilde*, * J., [* **435**] it was admitted that the premises described in the petition were a part of the estate of the petitioner's father, and, after his death, were assigned to *Lucy Barnard*, his mother, as her dower; and that she died in January, 1805. The petitioner, at the time of his father's decease, had four brothers and five sisters, to whom with him the estate descended; and it was admitted that he had a good right to have partition thereof, unless precluded by the evidence offered on the trial by the respondent.

The respondent produced in evidence the deed of one *William Barnard*, dated April 18, 1807, duly acknowledged and recorded, whereby he conveyed in fee simple to one *John Peck* one undivided moiety of the reversion in said premises, assigned as aforesaid to the said *Lucy*; and it was admitted that the said *Peck* had conveyed the same by deed to one *Folger*, and the said *Folger* to the respondent; who then offered to prove the parol declarations of the petitioner, that he had sold his share in the said premises to the said *William*; which the judge rejected as incompetent evidence.

The respondent then produced another deed from the petitioner's five sisters, dated April, 1816, whereby they conveyed to him another undivided moiety of the said premises; and proved that, soon after the death of the said *Lucy*, he entered into the premises, claiming them as his own, and had continued in possession of the same until the time of the trial.

There was no evidence of an actual ouster of the petitioner by the respondent, or that the petitioner had ever made any claim to the premises, or had demanded of the respondent any part of the rents and profits. It appeared that the petitioner had lived in the district of *Maine* ever since the respondent entered and took possession of the premises.

The judge instructed the jury that this evidence was not sufficient in law to preclude the petitioner from having partition of the premises; intending to reserve for the consideration of the whole Court, whether this * evidence was sufficient [* **436**] proof of an ouster or disseisin by the respondent; and if so, whether it was such an ouster or disseisin as would constitute a legal bar to the said petition for partition.

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The jury returned a verdict for the petitioner; and if the said parol evidence was improperly rejected, or if the evidence admitted was sufficient in law to preclude the petitioner from having partition, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be rendered for the petitioner, that partition be made, agreeably to the prayer of his petition.

Fay, for the respondent, contended that it was necessary for the petitioner to show himself in actual seisin of the premises, to entitle himself to partition. (1) Here was a complete disseisin. The respondent had always held adversely to the title of the petitioner.

The respondent offered to prove to the jury that the petitioner had confessed the existence of a deed from him to the person under whom the respondent claims to hold. His standing by and keeping silence, while such a declaration had been made by the respondent, would have been equivalent to a conveyance. In the case of *Porter* vs. *Perkins*, (2) the Court say, "whether a deed was or was not executed, is a question of fact, and ought to have been left to the decision of a jury upon evidence." (3)

Draper for the petitioner.

PARKER, C. J. The petitioner's title to the proportion set forth in his petition is admitted; and he is entitled to judgment for partition, unless, for one of the causes alleged in the motion for a new trial, the verdict was wrong.

The respondent, who holds one moiety of the land derivatively from *William Barnard*, the brother of the petitioner, and the other moiety under the deed of his five sisters, offered to prove the declarations of the petitioner, that he had conveyed his share to his brother *William*; and the evidence so offered was rejected.

[*437] *It not appearing by the report, when and where these declarations were made, or to whom, we cannot presume they were made under such circumstances as would prove fraud on the part of the petitioner, like the cases where a first mortgagee or lessee has been postponed in favor of a second in chancery. If it appeared that, when *William Barnard* conveyed to *Peck*, the petitioner stood by, knowing that his brother was about conveying a moiety, and had declared that he had conveyed his share to him, the case would be analogous to those alluded to, and would deserve serious inquiry whether so manifest a fraud must prevail in a court of law.

But the declarations offered to be proved might, for aught which appears in the report, have been made long after the conveyance to

(1) 7 *Mass. Rep.* 475, *Bonner & Al.* vs. *Proprietors of Kennebeck Purchase*
(2) 5 *Mass. Rep.* 235.
(3) See *Powell on Contracts*, 132, 133.

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Peck, and even to the respondent, so as not to have influenced the purchase; and in that case, it cannot be supposed for a moment that verbal declarations could operate to defeat a title otherwise unquestioned.

If the question had been relative to the existence of a deed supposed to be lost, or if the circumstances had been such as to justify a presumption by the jury that a grant had been made, declarations of the nature suggested might have been suitable evidence. But no circumstances warranting such an inquiry appear in the case; and if they do exist, some other mode of relief must be sought; for we must decide upon the facts only which are reported by the judge.

The other point, relied upon in support of the motion for a new trial, is the supposed want of actual seisin in the petitioner; and the case of *Bonner & Al.* vs. *The Proprietors of the Kennebeck Purchase* is thought to be decisive against the petitioner's claim.

In the very brief report of that case, it is stated, in general terms, that actual seisin is necessary in order to maintain this statute process for partition. We apprehend that this general proposition ought to be qualified by a reference to the facts to which it was applied. *It appeared in that case that [*438] the share claimed by the petitioner had been, more than forty years before, sold by the proprietors, by virtue of the authority given them by the statute, for non-payment of taxes; and that, during the whole of that period, it had been occupied under that sale; so that the seisin was not only out of the petitioner, but also out of the proprietors, and the right of entry was lost to them both. Under such circumstances, there was nothing to make partition of. The petitioners were not interested in common with the respondents, or any other person; and if their share had been unjustly or irregularly transferred, their remedy was against the proprietors, who had caused the mischief.

We think it cannot be inferred from that decision that an actual corporeal seisin is necessary, to enable a tenant in common to maintain this process. If it were so, this beneficial remedy would be much restricted in its operation; and it would always be in the power of one tenant, by ousting his co-tenant, to drive him to a writ of entry; which it certainly was not the intention of the legislature or of the court to do.

It is true that, by the common law and the *English* statutes, the writ of partition cannot be maintained by one tenant in common, who is disseised; not even if the disseisin be by the co-tenant. (4)

(4) *Co. Lit.* 167, *a.*

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But every dispossession does not amount to a disseisin, especially of tenants in common. For the possession of one is the possession of all, unless by an actual ouster, or an exclusive pernancy of the profits against the will of the others, one shall manifest an intention to hold the land by wrong, rather than by the common title. But without such overt acts, or a sole and exclusive possession for more than twenty years, so that the right of entry shall be gone, a disseisin is not to be presumed. All the tenants in common may therefore be actually seised, in the sense in which those terms are used in the case before referred to; and we think this is the sense in which the court applied them; for the facts in that case required it.

[* 439] * In the case at bar, there had been a sole possession by the respondent of the whole land, under a supposed title, only for ten years. There has been no actual ouster, nor any refusal to account for the rents or profits. The right of entry remained at the time of filing the petition; and, under these circumstances, we are clear that there is a sufficient seisin to maintain the process.

Judgment on the verdict

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF ESSEX, NOVEMBER TERM, 1817, AT SALEM.

PRESENT:

HON. ISAAC PARKER, CHIEF JUSTICE.
HON. GEORGE THATCHER, }
HON. CHARLES JACKSON, } JUSTICES.
HON. SAMUEL PUTNAM, }

JOHN MANSFIELD, Plaintiff in Error, *versus* EBENEZER HAWKES AND ANOTHER.

The establishing of a turnpike road over a general or common field is a dissolution of such common field.

THIS was a writ of error to the Circuit Court of Common Pleas for this county, upon a judgment rendered by them in an action originally commenced before a justice of the peace for this county by the now plaintiff in error.

The original action was trespass against the defendants, for taking and carrying away a cow of the plaintiff. The defendants justified on the ground that they were assessors of a general or common field, called *Romney Marsh*, in which the plaintiff was a proprietor; that they assessed a tax against the individual proprietors, in pursuance of a vote passed at a legal meeting of the proprietors;

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and that, for the non-payment of the portion of said tax assessed upon the plaintiff, they caused his cow to be taken and sold.

At the trial of the action before the Common Pleas, amongst other things, the plaintiff produced and relied on
[* 441] * the act of the commonwealth, passed March 6, 1802, incorporating certain persons, with powers to lay out and make a turnpike road from *Salem* to *Charles River bridge*; (1) and he proved that more than ten years ago, and long before the making of the said tax, the said turnpike road, extending over the said marsh three miles, and being eight rods in width, was made pursuant to the said act of the legislature, dividing the marsh into two nearly equal parts; which road still continues. The plaintiff contended that, by force of the said act or law, and of the making of said turnpike road in pursuance thereof, the said propriety was dissolved, and the said marsh ceased from that time to be a general and common field. But the court instructed the jury that the said act, and the locating and making of the said turnpike, did not discontinue or dissolve the said general field. And a verdict being returned for the defendants, the plaintiff tendered his bill of exceptions to the opinion of the court, as delivered to the jury, upon this and other points in the cause. As the court here gave no opinion upon the other points, it is unnecessary to state them.

The instruction to the jury above mentioned was among the errors assigned. The defendants in error pleaded *in nullo est erratum*, and the cause was argued upon all the points at the last November term, by *Merrill* for the plaintiff in error, and *Saltonstall* for the defendants in error; and at the last April term of the Court, holden at *Ipswich* in this county, the opinion of the Court was pronounced by

PUTNAM, J., (after a brief history of the action.) The question, whether the act of the 6th of March, 1802, and the making of the turnpike road, were not a discontinuance and dissolution of the general and common field, became a material subject of inquiry; for if the field had been discontinued, all the authority which the defendants claim to exercise over the plaintiff's property was at an end.

[* 442] * Such would have been the case if the proprietors had voted to dissolve or discontinue the general field, pursuant to the statute of 1784, c. 53, § 8. That is only one mode by which a dissolution may take place. It is easy, however, to suppose that the same effect may be obtained by various other modes. If the proprietors should all agree, by deed, to discontinue

(1) *Stat.* 1801, c. 63

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such field, we see no objection to it. So, if they were to grant a way through their field, and should covenant that the grantees should enjoy it as a highway, without any obstruction from the proprietors, such a grant, being entirely inconsistent with an occupation by an entire enclosure, would necessarily operate as a discontinuance.

The case last supposed is not so strong as the case at bar. The public have acquired a way through the middle of this field. The act of the legislature, and the proceedings under it, are equivalent to a declaration, on the part of the legislature, that this field should no longer be fenced into one enclosure. It became necessary, or convenient, for the public to pass through it; and it would not be lawful for the proprietors to obstruct the public will. After the road was established, the proprietors could not lawfully shut or fence it up. Such an act would be an offence.

Suppose (which, however, is not decided in this case) that the plaintiff was, before the establishment of the turnpike road, liable to contribute, as a proprietor in a general field; he would be discharged afterwards, upon the settled rule that, where a party was bound to perform any act which the law afterwards prohibits, he shall be excused.

This view of the case, with which, after much consideration, we are all satisfied, renders it unnecessary to give any opinion as to the other exceptions made by the plaintiff.

The entry must be, that the judgment of the Circuit Court of Common Pleas be reversed, and a *venire facias de novo* awarded, returnable to the bar of this Court.

[*443]

*JACOB LITTLE, Plaintiff in Audita Querela, *versus* THE PRESIDENT, DIRECTORS, AND COMPANY, OF THE NEWBURYPORT BANK.

If a prisoner on execution procure his liberation, under an agreement to surrender himself upon certain terms, and he executes such agreement, and is committed again on the execution, he can have no remedy by process of *audita querela.*

THIS suit was brought by the plaintiff, to obtain relief from imprisonment upon an execution, which issued upon a judgment obtained by the defendants against the plaintiff in this Court, Novem

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ber term, 1814, for 5723 dollars 15 cents debt, and 29 dollars 8 cents costs; upon which execution the plaintiff was arrested on the 4th of March, 1815, the execution being returnable to this Court at the succeeding April term.

The plaintiff avers that the defendants, after the arrest on the same 4th of March, discharged him, and consented that he should go at large; and afterwards, on the 11th of the same month of March, caused him to be arrested and imprisoned again on the same execution.

At the trial, which was had on the general issue, before *Putnam*, J., at the sittings here after November term, 1815, it was in evidence that, on the 4th of March, 1815, the plaintiff, (being then in prison on the said execution,) and the directors of the bank, and *Moses S. Little*, son of the plaintiff, and *David Little*, brother of the plaintiff, met at the prison in *Newburyport;* that the plaintiff wanted time, to make arrangements for the settlement of the execution; and it was finally agreed that the defendants should give the plaintiff one week, on condition that the said *David* and *Moses S.* would sign a note, with the plaintiff as principal, for the amount of the execution, payable to the defendants in one week; which note was to be given up, if the plaintiff should be forthcoming in one week; in which case the execution was to be in force against him in the same manner that it originally was; but otherwise the note was to be in force.

The said note was accordingly made and signed as aforesaid, and put into the hands of *W. Bartlett*, Esq.,
[* 444] * the president of the bank, to be delivered up on the terms aforesaid; and the plaintiff was thereupon, by the consent of the defendants, permitted to go at large, upon the agreement aforesaid.

The sureties gave notice to the defendants, within the week, that they should deliver up the plaintiff; and on the 11th of March, the sureties and the parties met at the prison. The plaintiff produced testimony tending to prove that the sureties delivered him up; and the defendants produced evidence to prove that the plaintiff voluntarily surrendered himself. He was, in fact, recommitted on the execution by direction of the defendants, and detained in prison from the said 11th of March to the 25th of April following. There was some evidence in the case tending to prove that the plaintiff procured his said discharge from imprisonment on the 4th of March by fraud.

All the evidence was submitted to the jury, with instructions from the judge to the following effect: That the general rule of law is

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that, when a debtor has been once arrested on execution, and afterwards, by the consent of the creditor, is permitted to go at large, he cannot be again arrested on the same execution; that this rule is subject to some limitations; as where the discharge was procured by the fraud of the debtor; and if the jury, from the evidence, believed that the discharge in this case had been so procured, they should find a verdict for the defendants.

So, if the discharge was procured by the debtor, for his accommodation, under an agreement to surrender himself upon terms, which agreement the debtor should execute and carry into effect, he would not be entitled to any redress for such imprisonment: and the jury were instructed to inquire whether the plaintiff did voluntarily surrender himself, pursuant to the agreement aforesaid; and if they should find that he did so, then their verdict should be for the defendants; that such debtor, having executed his agreement, cannot by law be permitted to contend that the service of the execution * is an act of oppression, and is not entitled to maintain an *audita querela* for such imprisonment. [*445]

The jury found a verdict for the defendants, on the ground that the plaintiff did voluntarily surrender himself. They conversed about the question of fraud, but could not agree respecting it. The verdict was taken, subject to the opinion of the whole Court. If the direction to the jury was wrong, the plaintiff was to have a new trial; otherwise the verdict was to stand.

The cause was argued at the last October term in this county, by *Banister* for the plaintiff, and *White* for the defendants.

Banister contended that a debtor, once taken in execution and liberated by the consent of his creditor, can in no case be again charged in execution on the same judgment, unless he has obtained such liberation by fraud. This being the only exception, and which is not found by the jury in this case, the second imprisonment of the plaintiff was against law. The case put by the judge, in his direction to the jury, of a voluntary surrender by the debtor, pursuant to an agreement between him and his creditor, is not supported by the authorities. The plaintiff was discharged by the defendants upon a new contract; and the only remedy of the latter was on that contract. The execution once satisfied, as it had been by the commitment of the judgment debtor, was *functus officio;* and it could not be revived or put in force by any contract of the parties. If the note, given by the debtor and his sureties, was good in its origin, it could not have been avoided by the makers of it, because the promisees should refuse to do an unlawful act. At any rate,

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the creditors could not hold at the same time two securities for the same debt, and both of them valid against the debtor. (1)

White argued that the agreement under which t. e plaintiff was liberated was entered into by the defendants at the particular request of the plaintiff, and was punctiliously adhered to by the defendants. There was, then, no such act of oppression as would support this process. The parties were competent to
[*446] make the * agreement; there was nothing illegal in it, on the part of the defendants, it was purely an act of humanity. The oppression and hardship are wholly with the plaintiff. He would deprive the defendants of all remedy for a debt acknowledged to be due; and the whole ground of his complaint is, that the defendants will not yield to this, but have pursued the very course he had agreed that they should pursue. They were obliged, by their promise, to give up the note, and then, by the plaintiff's own agreement, the execution revived.

This process of *audita querela* lies for a judgment debtor to be relieved against the oppression of his creditor, and is said, by Judge *Blackstone*, to be in nature of a bill in equity. (2) The facts in this case show any thing rather than oppression by the defendants; and the plaintiff's object is utterly inconsistent with equity and good conscience. In the case of *Lovejoy* vs. *Webber*, (3) it is said by the Court, that in this process, "An allegation of fraud and deceit," on the part of the defendant, "seems to be necessary, and the case supposed must be one where legal process has been abused, and injuriously employed to purposes of fraud and oppression." So far from there having been any thing of this kind in the conduct of the defendants in the case at bar, nothing could have been more humane, fair, and gentle, than their whole treatment of the plaintiff.

On the part of the plaintiff, there is nothing but a mere technical rule. But even this rule, as explained by the authorities, does not apply to the present case. Here was a voluntary surrender of himself by the plaintiff, and that in fulfilment of a legal and fair agreement. The case of *Vigers* vs. *Aldrich* went upon another ground; for in that case the debtor had not surrendered himself to be taken a second time in execution; and all the other cases cited for the plaintiff depend on that case.

It is conceded by the plaintiff that fraud on his part would effectually bar him. But unless he intended in good faith to submit

(1) 4 *Burr.* 2482, *Vigers* vs. *Aldrich*. — 1 *D. & E.* 557, *Jaques* vs. *Withy*. — 6 *D. & E.* 525, *Clark* vs. *Clement & Al.* — 7 *D. & E.* 420, *Turner* vs. *Hague*. — 1 *B. & P* *Da Costa* vs. *Davis*. — *Barnes's Notes*, 205.

(2) 3 *Black. Comm.* 406. — See, also, *Bac. Abr.*, tit. *Audita Querela*.

(3) 10 *Mass Rep.* 103.

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himself to be retaken on the execution, upon the condition agreed, he was guilty of a *gross fraud, in taking [*447] the benefit of the defendants' agreement and concession, and then attempting to deprive them of all remedy for their demand. If the cause is put on this narrow ground, the defendants are entitled to recover.

PARKER, C. J. The only question presented in this case is, whether the direction of the judge to the jury was right; that if the enlargement from prison was procured by the plaintiff for his accommodation, upon an agreement to return upon the event of his sureties' choosing to surrender him, instead of paying the note they had given for him, and that, if he did voluntarily surrender himself, pursuant to that agreement, he was not entitled to relief under this process.

We are entirely satisfied that this direction was right, and that it is not shown to be otherwise by any of the authorities which have been cited by the plaintiff's counsel. All those authorities tend to establish one principle, which we do not call in question, *viz.*, that, when a judgment debtor has been taken in execution, and discharged by the creditor's consent, he cannot be again taken upon that execution, or upon any other which may be issued upon that judgment; the arrest of the debtor upon execution, by order of the creditor, being considered even as a satisfaction at the common law.

The cases of fraud and of escape, however, are exceptions. So, we apprehend, is the case of a temporary or conditional liberation, under a promise to return if the terms are not complied with, and an actual return into custody in pursuance of such agreement; which is the rule that was stated by the judge in this case.

The authorities cited prove that the debtor cannot be taken again, even in such circumstances; but that the creditor must resort to his action for non-performance of such agreement. But if the agreement is voluntarily performed, the arrest is as at the beginning; the debtor having, by his own act and consent, restored things to the state they were in before his enlargement took place. In the case of *Brown* vs. *Getchell & Al.* (4) a bond given by a debtor, who had been arrested, and being afterwards *liberated, voluntarily returned to prison, was held good; [*448] because the imprisonment, as it respected him, was not unlawful, he having consented to it.

The jury in the case at bar have not, by their verdict, settled the point of fraud which was committed to them; but if the plaintiff could now be relieved, the note having been returned, and the

(4) 11 *Mass. Rep.* 11.

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plaintiff having procured his enlargement for the purpose of settling the debt, the most gross injustice would be done; and the creditors would, in point of fact, be cheated out of their judgment. But we think the case free from all doubt; and judgment must therefore be rendered on the verdict.

THOMAS KITTREDGE *versus* THE INHABITANTS OF NEWBURY.

Where a pauper had immediate need of a surgical operation, in a town in which he was not legally settled, and the same was performed by a surgeon not belonging to such town, without being requested by the overseers of the poor, the town was holden not liable; and the surgeon not having made a demand within three months, it was holden, that the town would not have been liable, if he had been an inhabitant of the town.

THIS was an action of *assumpsit* for surgical aid rendered to one *Thomas Dennett*, a poor person belonging to the town of *Newburyport*, but having need of immediate relief in *Newbury*.

Trial was had upon the general issue before *Putnam*, J., at the last April term at *Ipswich;* when it was in evidence that the said *Dennett* was a boy, who worked at a woollen manufactory in *Newbury;* and received an injury from the explosion of some gunpowder there, which rendered it necessary to amputate his leg immediately, and before there would have been an opportunity to apply to the overseers of the poor of *Newbury* for their directions; that the plaintiff performed the service at the request of the attending physician; and that the same was reasonably worth the sum demanded.

It was also proved that the plaintiff gave notice of his claim to, and demanded payment of it from, the overseers of the [* 449] poor of *Newbury*, within two years, * but not within three months, after the service was rendered. But it was in evidence that one of the said overseers was informed of the situation of the said *Dennett*, and that he was in distress, and stood in need of immediate relief, within ten days after he was wounded. The said overseer, however, testified that he did not understand that any claim was then intended to be made against the town, or any application to him as an overseer, and that he gave no notice of the information he had received to the board of overseers.

The defendants contended, at the trial, that the plaintiff, not being an inhabitant of *Newbury*, but of another town, never had any right of action against them; that, if he had, he was bound to notify

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them within three months, that they might have notified and recovered of the town of *Newburyport*, where the pauper had his legal settlement; and that towns are not liable, even to individual inhabitants, until after notice.

The plaintiff gave no evidence of any express promise, but contended that the defendants were bound by law to afford immediate relief to persons in distress; and that the aid rendered by him in this case was under such circumstances as would raise a promise, by implication, on the part of the defendants to pay.

A verdict was taken for the defendants, which was to be set aside, and they were to be defaulted, if the whole Court should be of opinion that the plaintiff was entitled to recover upon the foregoing evidence; otherwise judgment was to be according to the verdict.

Cummings, for the plaintiff, argued that the defendants were bound by law to furnish the necessary aid and relief to this pauper, under the circumstances of the case; and the plaintiff having done the service, which they were under legal obligations to see performed, there was a sufficient consideration to support the action, although no request be shown to have been made by the defendants. (1) From the cases referred to, it will appear that the plaintiff had a legal right of action *against the defendants, [*450] upon the performance of the service; and as to the requisition of notice within three months, it has no application to a case like the present, but wholly relates to actions between towns. (2)

Moseley, for the defendants. The whole obligation on towns to support or relieve paupers is grounded on the provisions of our own statutes; and every person or corporation, claiming remuneration on such account, must bring their case within those statutes. The plaintiff, not being a citizen of *Newbury*, has no right of action against the defendants, the provision, in case of relief by an individual, being confined to inhabitants of the town. But even this provision has no operation until after notice and request made to the overseers. (3) That notice should be in season, if defendants were liable at all, for them to have their legal remedy over against the town of the pauper's settlement.

Per Curiam. Towns are under no moral obligation to pay for the support or cure of paupers; especially of such as have their

(1) 1 *H. Black.* 90, *Jenkins* vs. *Tucker* — 8 *D. & E.* 308, *Exall* vs. *Partridge* & *Al* 3 *Esp. Rep.* 89, *Houlditch & Al.* vs. *Milne.* — 3 *B. & P.* 253, *Wennall* vs. *Adz* &.
(2) *Stat.* 1793, c. 59, § 9.
(3) 2 *Mass. Rep.* 547, *Cargill* vs. *Wiscasset.* — *Ibid.* 567, *Doggett* vs. *Dedham* 12 *Mass. Rep.* 333, *Mitchell* vs. *Cornville.*

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legal settlement in other towns. The legal obligation is created by statute, and it exists, and can be enforced, only according to the provisions of the statute. The town is answerable to an individual only when the overseers have been applied to, and until they shall furnish the supply.

The case of a sudden necessity for medical or surgical relief seems to have been overlooked by the legislature. The remedy now is, for the person applying to the physician or surgeon to pay him, and if an inhabitant, to demand a reimbursement from the town. Cases of this nature, however, seem to require a further interposition of the legislature.

But the plaintiff in the present case has no right of action, even if the supposed legal obligation of the defendants to provide this relief had been made out. For in that case he should have made his demand seasonably for the defendants to have had their remedy against the town of *Newburyport*, where the pauper had
[* 451] his * lawful settlement. Not having done this, he is not even in an equitable point of view, entitled to recover

Judgment on the verdict.

DANIEL A. WHITE, ESQ., Judge, &c., *versus* FRANCIS QUARLES.

Where an action is instituted by a judge of probate, upon a bond given to his predecessor in office, the Court will presume it to be a probate bond within the provision of the statute of 1786, c. 55, § 3, requiring such actions to be commenced in this Court; and such actions, if commenced in the Common Pleas, are not to be sustained.

THE plaintiff, in an action originally commenced in the Common Pleas, declares in debt upon a bond dated November 13, 1806, made by the defendant, and two others since deceased, payable to *Samuel Holten*, Esq., then judge of probate for this county, and to his successors in said office; and avers that he is the lawful successor of the said *Holten* in the said office. The condition of the bond (a copy of which came up in the case) reciting that the Supreme Judicial Court, on the petition of *John Fullington*, the principal in the bond, had authorized him, as guardian of one *Mary Brown*, a minor, to sell certain real estate of the said minor, was, that he should observe and comply with the directions of the law concerning the sale of real estate by executors, &c., and should account for the proceeds, &c., agreeable to law.

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Issue being joined on the plea of *non est factum*, and a verdict returned for the plaintiff at the last April term at *Ipswich*, the defendant moved in arrest of judgment, because the action was brought in the Circuit Court of Common Pleas; whereas, by law, it ought to have been brought originally in this Court.

Saltonstall, in support of the motion, relied on *Stat.* 1783, c. 46, § 3, by which it is provided that this Court, as the Supreme Court of Probate, shall have cognizance in the first instance of all matters wherein the judge of probate is a party or interested; and *Stat.* 1786, c. * 55, § 3, by which it is enacted [* 452] that all suits thereafter brought in the name of any probate judge upon a probate bond of any kind, shall be originally commenced in the Supreme Judicial Court held within or for the county unto which the said probate judges respectively belong.

Prince, for the plaintiff, contended that this was not a probate bond, within the intention of the statute, which contemplated bonds given by executors on proving a will, and by administrators on receiving letters of administration. This bond, to account for the proceeds of the sale of land, was given to the judge merely as trustee, and in pursuance of the special order of this Court, as a condition of authorizing the sale.

But if the objection is sufficient, it comes too late. It should have been made in the court below, by a plea in abatement, at the return of the writ, and before any imparlance. By pleading in chief, the defendant has waived the objection.

Saltonstall, in reply. This was properly a probate bond, required by *Stat.* 1783, c. 32, and was given officially to the judge of probate, or his successor could have no action upon it. It was not necessary to plead this matter; jurisdiction cannot be conferred by consent. (1)

Per Curiam. It does not appear, by any thing on the record, that the bond declared on is, in a legal sense, a probate bond; so that a want of jurisdiction in the Circuit Court of Common Pleas does not appear in the proceedings.

But it appearing in the declaration that the bond was given to *Samuel Holten*, Esq., judge of probate, &c., and to his successors in office, and the action being brought in the name of the present judge, as his successor, if it is not a probate bond, the action was not rightly brought; because the present plaintiff would, in such case, have no legal interest in the bond. The action must therefore be dismissed.

(1) *Com. Dig., Estoppel*, E, 1. — 5 *Co.* 30. — 10 *Co.* 65. — 3 *Wils.* 382. — *Salk.* 201 — 11 *Mass. Rep.* 411.

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* PHILIP BAGLEY *versus* PETER FRANCIS.

A promise was to pay money, provided a certain seaman did not render himself on board a certain privateer, and proceed to sea, and perform his duty as a seaman on board the vessel; the seaman rendered himself on board, and proceeded to sea, but left the vessel in a foreign port; it was holden that the money was due.

ASSUMPSIT on the following note of memorandum: "*Boston*, November 7, 1814. For value received I promise to pay Mr. *Philip Bagley*, or order, on demand, one hundred dollars, provided *John Baptist* does not render himself on board the private-armed schooner *M'Donough*, in the harbor of *Boston*, and proceed to sea, and perform his duty as a seaman on board said vessel. *Peter Francis*."

The parties agreed that the said *Baptist* did render himself on board the said schooner *M'Donough*, and proceeded to sea in the same; but left the said schooner in *France*, before the termination of her cruise. The parties also agreed that the following facts should be considered as part of the case, so far as they were material, and could be admitted as legal evidence in this action, *viz.* On the day of the date of said note, the plaintiff purchased of the said *Baptist* one half of his share of the prize-money of the said cruise of the said schooner, for which he paid the sum of fifty dollars; and the said *Baptist* made him a bill of sale thereof. The agents of the said schooner refused to pay the plaintiff any part of the prize-money gained in said cruise, on account of the said *Baptist's* share thereof being forfeited by his leaving the said schooner in *France*. A seaman's share in the said cruise amounted to the sum of one hundred and fifty dollars.

Upon these facts judgment was to be entered by nonsuit or default, as in the opinion of the Court law and justice should require.

Banister, for the plaintiff. The action of *Bainbridge* vs. *Downie* (1) was like this; and although there the plaintiff failed of recovering, because the *United States* were the party in interest, yet the Court expressed no doubt that the action lay for them.

[* 454] * *Saltonstall*, for the defendant, argued that the promise was void by the statute of frauds, and for this he cited the case of *Wain* vs. *Warlters*. (2) And he contended that, if the promise in this case were valid, here was no breach of the

(1) 6 *Mass. Rep.* 253. (2) 5 *East*, 10

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condition. The defendant engaged only in case *Baptist* should not render himself on board the privateer, and proceed to sea, and perform his duty as a seaman. All this he did.

PARKER, C. J. The only point in this case is, what is the true construction of the condition upon the performance of which the defendant was to avoid his promise. The defendant contends that, as *Baptist* rendered himself on board the ship, and proceeded to sea, he did all which he stipulated for him; and that he should have been coerced to the performance of his duty by the discipline of the ship.

But we think the engagement of the defendant was, that *Baptist* should so perform his duty during the cruise as to entitle himself to his share of the prize-money. Now, it appears that he deserted in *France*, before the cruise was finished, and has been adjudged, by a competent tribunal, to have forfeited his prize-money.

This seems to be the very act which the plaintiff undertook to secure himself against by this note.

We see no relation that this case has to the statute of frauds. If the promise be to pay the debt of another, it is in writing; and the consideration is legal and sufficient. The whole agreement seems also to have been in writing, and expresses the real consideration of the promise. These circumstances being the plaintiff's case within the most rigorous construction of the statute.

Defendant defaulted.

[*455]

*JOSEPH FRITH *versus* ABIGAIL SPRAGUE, Administratrix, &c.

It seems that the laws of a foreign country may be proved by the testimony of witnesses.

ASSUMPSIT for money had and received, and for money paid, &c. There was also a special count, stating that *Oakman Sprague*, the defendant's intestate, at *Turk's Island*, on the —— day of —— 1808, in consideration that the said *Frith* would become bound to the king, as surety for the said *Oakman*, in a bond in the penal sum of £100 sterling, with condition that the brig *Mars*, of which the said *Oakman* was then master, should not carry out of the government of that island any servant or slave, without leave of the master or

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owner, or person having the charge of the same, first had and obtained in writing, promised to indemnify said *Frith*, and save him harmless, &c. The declaration then avers that the *Mars* did carry a slave from the island without leave, &c.; and that *Frith* was obliged to pay, and did pay, on the 18th of December, 1809, 525 dollars to Messrs. *Wood & Joel*, the owners of the slave. This action was brought to recover the money so paid, with damages for not being saved harmless from the bond.

The defendant pleaded the statute of limitations; to which there was a replication similar to that in the case of *Hall* vs. *Little*, (ante, p. 203;) and to this there was a general demurrer and joinder.

At the trial of the said issue, which was had before *Putnam*, J., at the last April term at *Ipswich*, the plaintiff, to prove the law of *Turk's Island*, as applicable to this case, offered the deposition of one *George Gibbs*; which was admitted, notwithstanding the objection of the defendant, that the law of a foreign state ought not to be proved by witnesses.

[* 456] A verdict was taken for the plaintiff for the sum paid, with interest, &c., subject to the opinion of the * Court, whether the deposition of *Gibbs* ought to have been admitted, and on some other points arising out of the instructions of the judge to the jury, which were not insisted upon in the argument of the cause.

Banister, for the defendant, cited the cases of *Church* vs. *Hubbard*, (1) *Henry* vs. *Addy*, (2) *Buttrick & Ux.* vs. *Allen*, (3) *Delafield* vs. *Hand*, (4) *Kenney* vs. *Clarkson & Al.* (5)

Cummings for the plaintiff.

Per Curiam. The replication is adjudged good. It is unnecessary to decide whether the evidence objected to at the trial of the issue in fact was rightfully admitted or not, although we see no other way of proving the existence of a foreign law but by oral testimony. (*a*)

But the verdict is right, even if there were no law authorizing

(1) 2 *Cranch*, 187, 236.
(2) 3 *East*, 221.
(3) 8 *Mass. Rep.* 273.
(4) 3 *Johns.* 314
(5) 1 *Johns.* 385. — See, also, *Peake's L. of Ev.* 226.

(*a*) [Clearly there may be other proof. The written law of a foreign state is to be proved by a copy of the law, duly authenticated. — *Pictou's* case, 30 *How's State Trials*, 491. — *Bohtlink* vs. *Schneider*, 3 *Esp. N. P. C.* 58. — *Clegg* vs. *Levy*, 3 *Camp.* 166. — *Miller* vs. *Heinrick*, 4 *Camp.* 155. — *Middleton* vs. *Janverin*, 2 *Hagg. Cons. R.* 422. — *Richardson* vs. *Anderson*, 1 *Camp.* 65, (*a*). — 2 *Phillips and Amos*, 624. — 1 *Stark. Ev.* 248. — 2 *Stark.* 331. — The unwritten law of a foreign state (having first been ascertained to be part of the unwritten law by witnesses professionally conversant with the laws of the state) may be proved by the parol evidence of witnesses of competent professional skill. — *Miller* vs. *Heinrich*, ubi sup. — *Dalrymple* vs. *Dalrymple*, 2 *Hagg. Cons. R.* 81. — *Phill. & Am.* ubi sup. — *Stark.* ubi sup. — ED.]

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the requisition of the bond in this case. For admitting that requisition to have been wholly arbitrary on the part of the government of the island, the surety who stepped in in aid of the principal has a right to indemnity, if he has been compelled to pay the penalty, without any fraud or negligence on his part.

Judgment on the verdict

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SUFFOLK, MARCH TERM, 1817.

[The following case was omitted in its proper place in the volume, owing to the papers being mislaid.]

ASA WHITNEY AND ANOTHER *versus* ROBERT DUTCH AND THOMAS GREEN.

An infant made his promissory note, and when of age, being applied to for payment, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it and send it to the creditor. This was holden to be a sufficient ratification of the original promise.

Of two copartners in trade one was an infant, and the other of full age: the adult, for a debt of the copartners, made a promissory note in the name of the copartnership or firm, and the infant, after coming of full age, ratified it; and it was holden good against him.

ASSUMPSIT on a promissory note, made by the defendants to the plaintiffs, on the 18th of December, 1811, for 847 dollars 76 cents.

The defendant *Dutch* was defaulted. The defendant *Green* pleaded, — 1. The general issue; 2. That he was under age at the time when the note was made. The plaintiffs replied, that, after he came of age, he agreed to and confirmed the promise; to which he rejoined, that he did not so agree; on which also issue was joined.

It appeared at the trial, which was had at the last November term in this county before *Jackson*, J., that *Dutch & Green*, while the latter was under age, had agreed to be partners, and as such had often dealt with the plaintiffs. The note in question was signed by *Dutch*, using the firm and style of the house of *Dutch & Green* at a time when the latter was under age.

In March, 1816, after *Green* arrived at full age, the plaintiffs applied to him for payment of the note; when he acknowledged that it was due, and promised that, on his return to *Eastport*, where he resided, he would endeavor to procure the money and send it to the plaintiffs, saying at the same time that it was hard
[*458] for him to pay. * it twice; he alleging, as it was understood, that the supposed partnership had been a long time before dissolved; and that *Dutch* had taken the whole stock, and agreed to pay all the debts of the company.

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The counsel for the defendant contended that the implied power of one partner to bind the other was void in this case; as *Green* was a minor at the time of making the note, and therefore could not empower any agent or attorney to bind him in any manner; that the note was therefore void as to him, and not merely voidable; and so the supposed promise could not be confirmed or ratified by the subsequent promise or agreement, which was proved, as above mentioned.

The judge, intending to reserve the question for the consideration of the whole Court, directed a verdict for the plaintiffs on both issues, which was returned accordingly.

If the Court should be of opinion that the defendant *Green* was, under these circumstances, liable to the plaintiffs for the amount due on this note, the verdict was to stand, and judgment entered accordingly; otherwise the verdict was to be set aside, and a verdict entered for the defendants.

Leland, for the defendants, made two points, — 1. That the defendant *Green* never ratified the supposed promise declared on; 2. That he never made the promise.

1. For the ratification of an infant's promise after arriving at full age, an absolute, unconditional, and unequivocal engagement is as much required by law, as in the case of an original promise or undertaking by one of full age. A payment of a part of the debt, when of age, has not the effect of a confirmation, nor an acknowledgment that the debt is due. (1) In the case at bar, there was no promise to pay the debt; but that, on his return to his home, he would *endeavor* to procure the money and send it to the plaintiffs. The whole of his declaration should be taken together; and then it would amount only to an acknowledgment of the debt, and a promise that, on his return to his place of residence,
* he would endeavor to obtain the money from *Dutch*, [* **459**]
to whom it exclusively belonged to furnish it; and in
case his endeavors should be successful, he would forward the money to the plaintiffs.

2. The defendant *Green* never legally made the promise declared on. The note was void from the first, as to him. *Dutch* signed it for himself and for *Green*, as having authority to bind him. But it was not in the power of *Green* to confer any such authority. The relation between copartners, as to this point, is the same as the relation between principal and agent. Every act of one, in the name of both, is by virtue of the power mutually given. (2) But

(1) 1 *Comyns on Contracts*, 163, 164. — 10 *Mass. Rep.* 140, *Martin* vs. *Mayo* & *Al Exrs.*

(2) *Watson's Law of Partnership*, 167.

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an infant cannot make an attorney, or delegate such a power. Every act, therefore, done under such a supposed authority, is merely void; and is not capable of being made valid by any act of the infant after arriving at full age. (3)

Thurston, for the plaintiffs, argued that the promise of *Green*, which was relied on as a ratification, was express and unequivocal. "I will endeavor," &c., is tantamount, in common parlance, to a promise to do the thing. In the case of *Martin* vs. *Mayo & Al.* the ratification was extremely like that in the case at bar, and was held sufficient.

If the promise of *Green* was originally void, that of *Dutch* must have been so also; for it was joint. Copartners are joint-tenants; and there are several acts which an infant joint-tenant is bound to do by letter of attorney, notwithstanding his infancy. An infant copartner has the benefit of all contracts made by the company. Here *Green* received his share of the goods for which this note was given; and he had, too, the privilege of avoiding the obligation, when of age, if he could persuade himself that it was just and right to do so.

A letter of attorney by an infant is voidable, but not void. (4)

There is no small confusion in the books on the distinction between such acts as are merely void, and such as are voidable; but it seems most for the benefit of infants that their undertakings should in all cases be considered as voidable.

[*460] * PARKER, C. J., delivered the opinion of the Court.

The question presented to the Court in this case, and which has been argued, is, whether the issue on the part of the plaintiffs is maintained by the evidence reported.

The first objection taken by the defendants' counsel is, that no express promise is proved after the coming of age of the defendant. By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration on his part is necessary to defeat his power of avoiding it.

But the terms of ratification need not be such as to import a

(3) 1 *H. Black.* 75, *Saunderson* vs. *Marr.* — 3 *Burr.* 1804, *Zouch* vs. *Parsons.* — 2 *Lev.* 144. — 1 *Salk.* 279.

(4) 1 *Rol. Abr.* 730. — 9 *Vin. Abr.* 384.

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direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest; but by words, oral or in writing, which import a recognition and a confirmation of his promise.

In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand; and promised that he would endeavor to procure the money upon his return home, and send it to the plaintiff. This was sufficient to satisfy the jury that he assented to and ratified the original promise; for it would be a distortion of language to suppose that he meant only to endeavor to persuade *Dutch* to pay the money; and if he succeeded, that he, *Green*, would send it to the plaintiff. (*a*)

But the other point made in the defence is more difficult, and presents a question new to us all. This is, that the note, being signed by *Dutch* for *Green*, was void in regard to *Green*; because he was not capable of communicating authority to *Dutch* to contract for him; * and that, being void, it is not the [* **461**] subject of a subsequent ratification.

No such question appears to have occurred in our courts, nor in those of *England*, or of the neighboring states. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavorable to the principle contended for by the counsel for *Green*, that no such case has been found; for this silence of the books authorizes a presumption that no distinction has been recognized between acts of this kind done by the infant himself, and those done for him by another. We must, however, examine the principles by which the contracts of infants are governed, and see if, by any analogy to settled cases, the present defence can be maintained.

It is admitted, generally, that a contract made by an infant, although not for necessaries, is only voidable; and that an express adoption of it, after he comes of age, will make it valid from its date. Nor does the law require that he shall be sued, as upon the

(*a*) [Saying he would "*endeavor* to procure the money," hardly amounts to an *absolute promise* to pay; and an infant, on arriving at majority, cannot be made liable, upon a voidable contract made during infancy, only to the extent of the new promise which he makes. — 1 *Stark. Ev.* 2d *Lond.* ed. 405, 406, and cases there cited. — Besides, this seems to have been a hard case, on the part of *Green*, who was not only not liable for the original debt contracted by his partner in business, (*Glossop* vs. *Colman*, 1 *Stark. Rep.* 26. — *Goode* vs. *Harrison*, 5 *B. & Ad.* 147. — *Furlong* vs. *Bartlett*, 21 *Pick.* 401,) but by presumption of law, and in fact, had received no benefit from it, and surely could not, after coming of age, be bound by the promissory note which his partner gave for it in the name of the firm, without an *express* promise to pay it. — ED.]

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new promise; but gives life and validity to the old one, after it is thus assented to. But it is urged that this doctrine applies only to those contracts which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that, in the distinctions made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void; unless it be made to enable the attorney to do some act for the benefit of the infant, such as a power of attorney to receive seisin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable
[*462] *acts; and yet disagree with respect to the acts to be classed under either of those heads. One result, however, in which they all appear to agree, is stated by Lord *Mansfield*, in the case of *Zouch* vs. *Parsons*, cited in the argument, *viz.*, that, whenever the act done *may be* for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition which can be extracted from the authorities.

The application of this principle is not, however, free from difficulty; for, when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit or to his prejudice. For, if he had made a bad bargain in a purchase of goods, and given his promissory note for the price, and, when he came of age, had agreed to pay the note, he would be bound by this agreement although he might have been ruined by the purchase. Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are in all respects like contracts made by adults.

With respect to contracts under seal also, they are in legal force as contracts, until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed

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need not now be decided. A deed of land, by an infant having the title, would undoubtedly convey a seisin; and the grantee would hold his title under it, until the infant, or some one under him, should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, * which act must necessarily be done by letter of attorney under seal, is not absolutely void; although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants, it is not necessary nor reasonable to draw inferences which may be repugnant to the principles of justice, which ought to regulate contracts between man and man. [* 463]

The object of the law, in disabling infants from binding themselves, is to prevent their being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough that they may shake off promises, and other contracts, made upon valuable consideration, if they see fit to do it, when called upon to perform them. To give them still another opportunity to retract, after they have been induced, by love of justice, and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts, made by infants, are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule; or whether the contract now sued is in any sense different from a simple contract.

The only ground for the supposed exception is, that the note declared on was not signed by the infant himself, but by *Dutch*, claiming authority to sign his name as a copartner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities which have been alluded to.

But it is well known that copartners may, and generally do, undertake to bind each other, without any express authority whatever. Indeed, the authority to do so results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another by note or * bill of exchange, by oral, or even by implied, authority. The case of a deed, therefore, is entirely out of the question; so that the defendant does not bring himself within the letter of the authorities. and certainly not within the reason [* 464]

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on which they are founded. Then, upon principle, what difference can there be between the ratification of a contract made by the infant himself, and one made by another acting under a parol authority from him? And why may not the ratification apply to the authority as well as to the contract made under it?

It may be said that minors may be exposed, if they may delegate power over their property or credit to another. But they will be as much exposed by the power to make such contracts themselves, and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources, that infants cannot be prejudiced; for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires that they should be compelled to perform them.

Upon these principles, we are satisfied with the verdict of the jury, and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.

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SUPPLEMENT.

COMMONWEALTH OF MASSACHUSETTS.

An Act for giving further Remedies in Equity.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That, from and after the passing of this act, the justices of the Supreme Judicial Court shall have power and authority to hear and determine in *equity* all cases of trust arising under deeds, wills, or in the settlement of estates, and all cases of contract in writing, where a party claims the specific performance of the same, and in which there may not be a plain, adequate, and complete remedy at law; and the bill or complaint in such cases may be inserted in a writ of attachment, or original summons, returnable to the same Court, and such writ be served on the adverse party as other writs of attachment or original summonses are by law to be served; or the same may be otherwise brought, according to the course of proceedings in Courts of Chancery. And the said justices of the Supreme Judicial Court shall have authority to issue all such writs and processes as may be necessary or proper to carry into effect the powers hereby granted; and to make, from time to time, all necessary rules and orders for the convenient and orderly conducting of the said business; provided the same be not repugnant to the constitution and laws of this commonwealth; and provided, also, that the cases of contract, to which this act shall apply, shall be such only as shall be hereafter made in writing.

[Approved Feb. 10, 1818.]

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*COMMONWEALTH OF MASSACHUSETTS.

Suffolk and Nantucket, } ss. { SUPREME JUDICIAL COURT, MARCH TERM, 1818.

RULES FOR THE REGULATION OF THE PRACTICE IN CHANCERY

1. In suits and proceedings under the late statute for giving further remedies in equity, the Court adopt, as the outlines of their practice, the practice of the *English* Courts of Equity, so far as the same is not repugnant to the constitution and laws of the commonwealth, nor to the rules which the Court shall from time to time make, for simplifying the proceedings and preventing unnecessary delay and expense.

2. All unnecessary prolixity and repetition in the pleadings shall be avoided. The bill shall contain a full, clear, and explicit statement of the plaintiff's case, and conclude with a general interrogatory. But the plaintiff may, when his case requires it, propose specific interrogatories; and may allege, by way of charge, any particular fact for the purpose of putting it in issue.

3. Upon the general interrogatory contained in the bill, the defendant shall be required to answer fully, directly, and particularly, to every material allegation or statement in the bill, as if he had been thereto particularly interrogated.

4. The original process, to require the appearance of the defendant, (when the bill is not inserted in an original writ, as provided by the statute,) shall be a *subpœna* in the form following: —

COMMONWEALTH OF MASSACHUSETTS.

————, *ss.* To A. B., of ———— (*addition*)
Greeting.

We command you that you appear before our Supreme Judi-
(L. S.) cial Court, next to be holden at ————, within and for our said county of ————, on the —— Tuesday of ———— next, then and there to answer to a bill of complaint exhibited against you in our said Court, by C. D., of ————,
[*467] (*addition*,) and to do and receive * what our said Court shall then and there consider in this behalf. Hereof fail not, under the pains and penalties in the law in that behalf provided. Witness, J. P., Esquire, the ———— day of ————, in the year of our Lord, ————.

E. F., *Clerk.*

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The writ shall bear teste of the Chief Justice, or first Justice, who is not a party to the suit; and shall be under the seal of the Court, and signed by the clerk; it shall be served by the same officers, and in the same manner, as other original writs of summons are by law to be served.

5. The bill may be filed in the clerk's office in vacation, and a *subpœna* shall thereupon issue of course, upon the application of the plaintiff or his solicitor, returnable at the then next term of the Court. The *subpœna* in such case shall be served fourteen days at least before the day on which it is returnable. When the bill is filed in term time, the Court will order the *subpœna* returnable on a certain day in the same term, or at the ensuing term, as the case may require. But the defendant shall never be compelled to appear, nor subjected to any penalty for not appearing, unless the *subpœna* be served upon him fourteen days at least before the day on which it is returnable.

6. The plaintiff may, in all cases, cause the defendant to be served with a copy of the bill, at the same time that the *subpœna* or other original writ is served, and by the same officer by whom such writ is served; the copy to be delivered to the defendant, or left at the place of his last and usual abode, and to be attested by the clerk, unless the bill is inserted in a writ of attachment or summons; in which case, the copy shall be attested by the officer by whom the same is served. And when such copy of the bill shall have been duly served on the defendant sixty days or more before the day on which the writ is returnable, the defendant shall be held to plead, demur, or answer, on the return day of the writ, unless, for good cause shown, the Court shall allow further time for that purpose.

7. When the bill is filed in term time, and a *subpœna* is issued returnable at the ensuing term, the defendant shall file his plea, demurrer, or answer, in the clerk's office, at such time in the vacation as the Court shall order, not less than sixty days after service on him of the *subpœna*, and of an attested
*copy of the bill, provided that he be served with a [*468]
copy of such order at the time of the service of the *subpœna*. And when an answer is so filed, the plaintiff may file his replication in the clerk's office in the same vacation; and upon giving notice of such replication to the defendant, not less than thirty days before the ensuing term, the parties may proceed to take the examination of their witnesses, so that the cause may be heard and determined at the ensuing term. Or if the plaintiff shall elect to proceed to a hearing of the cause on the bill and answer, he may

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give notice thereof to the defendant, not less than thirty days before the ensuing term, and the cause shall be then heard and determined accordingly.

8. If the defendant, being duly served with the *subpœna*, or other original process, shall neglect to enter his appearance on the return day thereof, and if it shall appear to the Court, by the return of the officer or otherwise, that he had personal notice of the suit fourteen days at least before such return day, his default may be recorded, and the bill may be taken *pro confesso*.

9. The defendant's answer may be sworn to before any justice of the peace for the county where the defendant may be; and in such case, it shall be enclosed and sealed by the justice, and returned unopened into the clerk's office. The answer may be then opened by the clerk, for the inspection of the plaintiff, that he may reply, or proceed thereon, as he shall be advised.

10. All testimony shall be by depositions, to be taken (if within the commonwealth) before any justice of the peace, being either a judge of any Court of Common Pleas, a judge of probate, or a counsellor of this Court, not interested nor of counsel in the cause; and if without the commonwealth, the depositions shall be taken before commissioners, to be appointed by the Court, or by any justice thereof in vacation.

11. The examination of witnesses shall be had upon interrogatories, to be filed in the clerk's office by the party producing the witness, and upon such cross interrogatories as may be filed by the adverse party. The party filing the interrogatories shall give notice thereof to the adverse party, or to his solicitor or counsel, seven days, at least, before taking out the commission, [* 469] and one day more for every ten miles that such * party, or his solicitor or counsel, shall live from the clerk's office; and when the witness to be examined is within the commonwealth, the clerk shall issue of course a commission or order, with the title of the cause, and of the Court in which it is pending, authorizing any of the magistrates mentioned in the preceding rule to take the examination of the witness, upon the interrogatories annexed to the order.

12. All the notices, required by these rules to be given to the plaintiff, may be given to his solicitor or counsel; and all such notices to be given to the defendant, if after he has entered his appearance, may be given to his solicitor or counsel.

13. Whenever it shall become necessary or proper to have any fact tried and determined by a jury, the Court will direct an issue for that purpose to be formed by the parties, containing a distinct

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affirmation of the points in question, and a denial or traverse thereof; and the issue, thus formed and joined, will be submitted to a jury in the same Court in which the suit may be depending.

Ordered by the Court.

JOHN CALLENDER, *Clerk of Sup. Jud. Court.*

[*470]

*OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT ON THE CONSTITUTIONAL QUESTION OF FILLING VACANCIES IN THE COUNCIL.

WE have considered the question put to us by the honorable Senate, whether the two branches of the General Court have a constitutional right to fill up vacancies in the Council, that happen by death or resignation of the members thereof.

By the constitution, chap. 2, sect. 1, art. 1, There shall be a supreme executive magistrate, who shall be styled the governor, &c. Art. 2. The governor shall be chosen annually. Sect. 2, art. 1. There shall be annually elected a lieutenant-governor, &c.

It may be observed that, in case a vacancy in either of those offices happens, no provision is made for supplying them in the constitution. The reason is plain; because, in case a vacancy happens by reason of the death of the governor, or his absence, the lieutenant-governor shall have the same powers. In case the lieutenant-governor's place is vacant also, then the Council, or major part of them, shall have the same powers, by sect. 3, art. 6.

So careful were the makers of the constitution to provide for that important part of the machine of government, the supreme executive.

The question, then, is, Has the constitution provided for the support of this important part in government; who at all times, when the chair is full, are to assist the governor in ordering and directing the affairs of the commonwealth, according to the laws of the land? Sect. 3, art. 1. They are to assist the governor in determining the elections, summoning the members, administering the oaths, drawing money out of the treasury, appointing civil officers, &c.

By the article last cited, *There shall be a Council* for advising the governor in the executive part of government, *to consist of nine persons*, besides the lieutenant-governor. Art. 2. *Nine counsellors shall be annually chosen* from among the persons, &c. The consti-

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tution has provided for keeping up this important body, in case the number of nine persons first chosen do not accept their
[*471] seats. The deficiency is to be made * up by the Senate and House of Representatives assembled in one room, &c. Chap. 6, art. 2. When persons belonging to the House or Senate shall be chosen or appointed to certain offices, and they shall accept thereof, it shall operate as a resignation of their seat, and other persons shall be appointed to fill them; and the *same rule* shall take place, when a counsellor shall be appointed to certain offices, and he shall accept thereof. Thus, in case of an implied resignation, the Council is to be kept full.

Chap. 2, sect. 4, art. 1. The secretary, the treasurer, and receiver-general, the commissary-general, &c., shall be chosen annually; but no provision is made for filling those offices. In case a vacancy by death or resignation, is the government to be without those offices? It cannot be. We are certainly to construe the constitution beneficially, in favor of the people of the government, for whose benefit it was made, and not in the nature of a penal statute, which is to be construed strictly.

It seems very clear, from the foregoing paragraphs, that the constitution designed those offices should be always filled, and that a council of nine persons should exist; and that in one case of a vacancy, arising by an *implied resignation*, it is expressly provided that it shall be filled up; which, from the reason and nature of things, implies a constitutional power of filling up seats *directly and positively vacated* by death or *actual resignation*.

We are therefore of opinion, that the two branches of the General Court have a constitutional right to fill up vacancies in the Council, which happen by death or resignation of the members thereof.

WILLIAM CUSHING,
NATHANIEL PEASLEE SARGEANT,
DAVID SEWALL.

Salem, November 12, 1784.

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*OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT UPON THE RIGHT OF THE LEGISLATURE TO COMMUTE THE PUNISHMENT FIXED BY LAW, AFTER SENTENCE.

TO THE HONORABLE THE SENATE:

HAVING considered the question referred to us by the Hon. the Senate, in their order of the —— day of October last, we are all of opinion that the General Court have not a right, in any case, to commute the punishment fixed by law, after sentence has been given.

Our opinion is founded upon the eighth article of the first section of the second chapter of the frame of government, which article lodges the power of pardoning offences (except such as persons may be convicted of before the Senate, by an impeachment of the House) solely in the governor, by and with the advice of the Council; to which power the right of commuting punishment, if by such right be meant a right of pardoning upon condition of the convict's voluntarily submitting to a lesser punishment, must be a necessary incident.* And we need not cite the last article of the declaration of rights; which means to keep the legislative, executive, and judicial departments as separate and distinct as possible, in the exercise of the respective powers assigned them by the constitution.

We are, with the greatest respect, your honors' most obedient servants,

WILLIAM CUSHING,
NATHANIEL P. SARGEANT,
DAVID SEWALL,
FRANCIS DANA,
INCREASE SUMNER.

Cambridge, November, 1781.

* Note written by Chief Justice Cushing, on his copy of the foregoing communication. — "It might have been added here, — But if by such right he meant a right of changing, authoritatively, the punishment of law, after sentence given, we are of opinion that such right does not exist any where in the government."

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*SUFFOLK, MARCH TERM, 1768.

SUPERIOR COURT OF JUDICATURE, &c

PRESENT
HUTCHINSON, CHIEF JUSTICE.
LYNDE, CUSHING, OLIVER, AND TROWBRIDGE, } JUSTICES

BENJAMIN DAVIS AND EDWARD DAVIS *versus* SYLVESTER RICHMOND, ESQ.

[The opinion of the puisne justice of the Court, in the following case, was copied from a manuscript in the hand-writing of the late Hon. INCREASE SUMNER, many years an ornament of the bench, from which he was called, by the suffrages of his fellow-citizens, to the office of governor of the commonwealth. Those of the profession who have learned, from the frequent mention of Judge TROWBRIDGE in these Reports, to venerate his memory as one of our first jurisconsults, will require no apology for the insertion of this original argument in this place.]

THIS was an action of the case against the said *Richmond*, as sheriff of the county of *Bristol*, in which the plaintiffs alleged that they commenced an action upon certain promises against *E. Stetson*, of *Dighton*, in said county, and delivered the original writ in that suit to *S. R.*, Jun., a deputy of the said *Richmond*, who returned thereon an attachment of certain real and personal property; that the plaintiffs, having recovered judgment in that suit against the said *Stetson*, delivered their execution to the same deputy, within thirty days from the rendition of the said judgment; who returned thereon that he had made diligent search, &c., and could not find any estate of the said *Stetson* within his precinct where-
[*474] on to levy the same execution, * and that he could not take his body, as he had, as an insolvent debtor, obtained a certificate from two of the justices of the Superior Court of Judicature for his discharge; and so he returned the execution in no part satisfied.

Upon the trial of the action, at the preceding August term in *Suffolk*, the jury found specially, —

1. That the goods and estate of *E. Stetson* were legally attached

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on the 3d day of May, by the deputy sheriff, to answer the demands of the plaintiffs against said *Stetson*.

2. That said *Stetson* doth not appear to us to be an absconding debtor, until the 6th day of May aforesaid.

3. That the execution in the case was delivered to the said deputy before thirty days after judgment were expired.

4. That the plaintiffs gave the deputy no orders or directions concerning the said attached effects.

5. That if the deputy sheriff was held by law to levy said execution on said effects, without any special directions from the creditors, they find for the plaintiffs the sum of, &c.; otherwise they find for the defendant.

TROWBRIDGE, J. A common judgment creditor in *England* has his election to sue out a *levari facias*, *fieri facias*, *elegit*, or *capias ad satisfaciendum*, but can execute but one of them at a time. The *levari facias* commands the sheriff that, of the lands, goods, and chattels, of the debtor, he cause *to be levied* the sum recovered, so that he have it in court, to be delivered to the creditor. The *fieri facias* commands the sheriff *that he cause to be made* of the goods and chattels of the debtor the sum recovered, and to have the *money* in court, &c., to render the creditor his debt, &c. The *elegit* commands the sheriff to deliver the debtor's goods and chattels (except the cattle of the plough) and half of his land *at a reasonable price and extent*, to hold until the debt is levied. The *capias ad satisfaciendum* commands the sheriff to take the debtor's body, and bring him into court at the return day, that he may pay the debt, &c.

All these writs are directed to the sheriff only, and he only is to make return thereof. Upon the *levari facias*, the money is to be *levied by sale* of the goods and chattels, and the issues of the land. Upon the *fieri facias*, the sheriff is to make the money *by sale* of the goods and chattels. Upon an *elegit*, the
*sheriff cannot *sell*, but must *deliver* the goods and [*475]
chattels, and half the lands, to the creditor, at the value put upon them by a jury of twelve men under oath; and if there be goods and chattels enough to answer the debt, the land is not to be extended. (1) If the debtor pays the money, the sheriff ought not to sell the goods on the *levari facias* or *fieri facias*, or deliver them, or extend the land on the *elegit*. Although by the *capias ad satisfaciendum* the sheriff is commanded to bring the body into court, yet, if he receive the money of the debtor, and bring it into court, or pay it to the creditor, the court will excuse him.

A common judgment creditor *here* can have but one execution

(1) 2 *Inst.* 396.

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and that is directed to the sheriff, his under sheriff or deputy; reciting the judgment, and commanding them that, of the goods, chattels, and land, of the debtor, they cause to be paid and satisfied to the creditor, *at the value thereof in money*, the aforesaid sums, and thereof also to satisfy themselves for their own fees; and for want of, &c., or that he be discharged by the creditor, &c., and to make return of their doings, &c. The officer is not commanded to levy such sums of *money*, of the goods, &c., and to bring it into court, as by the *levari facias*, or to pay it to the creditor; but he is, of the debtor's goods, chattels, or lands, to cause to be paid and satisfied to the creditor, *at the value thereof in money*, the sums recovered, &c.; that is, to cause the creditor to be paid and satisfied his debt, in the goods, chattels, or lands, of the debtor, at a reasonable price and extent, as in the *elegit;* and the officer being also commanded, for want of goods, &c., *to the acceptance of the creditor*, to take the debtor and imprison him, shows that the creditor has his election to take his satisfaction in the goods, chattels, or lands, of the debtor, or to have his body imprisoned until he pays the money, and that he has no other choice. He cannot oblige the officer to take the debtor's goods, chattels, or lands, and sell them, and thereby raise money to pay the debt; nor can he do it without consent of the debtor.

The sheriff has no right to take a debtor's estate, and sell it, unless he is empowered by law to do it; and neither the common law, nor any statute or law of the province, empowers
[*476] him * to do it here, unless it be the execution established by law; and that neither expressly empowers him to do it, nor requires him to do any thing that he cannot do without having such a power, as do the *levari facias* and *fieri facias;* and therefore he has no such power.

Of what consequence would it be to the creditor, whether goods or estate of the debtor, tendered or found, were *to his acceptance* or not, if the creditor was not to receive the same in satisfaction of his debt, but the officer was obliged to raise the money by the sale thereof? It should, in that case, rather have been to the acceptance of the officer than the creditor. But the writ expressly makes the debtor's being imprisoned or not depend on the goods or estate tendered or found being to the acceptance of the creditor, or not; or, in other words, on his being content to receive the same, at the appraised value in satisfaction of the judgment.

There is neither price nor value mentioned in the *fieri facias* nor in the *levari facias;* nor was it proper for either to be inserted in either of those writs, as the estate was to be sold for the most it would fetch, be it more or less. Because, if either the words *at a*

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reasonable price, as in the *elegit*, or *at the value thereof in money*, as in our writ, had been in the *fieri facias*, or the *levari facias*, the sheriff must have caused the estate to be appraised, before he sold it for the most it would fetch, and have made return thereof accordingly; and that would have been attended with considerable expense to no good purpose. For that reason, they were not inserted in either of those writs, upon which the money was to be raised by the sale of the estate; but with great propriety were inserted in our writ, whereby the creditor was to receive his satisfaction in the estate, if he pleased, and not by the proceeds of the sale of it.

The words, *to the acceptance of the creditor*, were not in the writ when it was first established, as appears by the 4 and 5 of *Will. & Mar.* c. 21, but were inserted by force of that act, on purpose to give the creditor the election aforesaid, and to oblige the officer to govern himself accordingly. The clause of the act to this purpose is not in either of the last impressions of our laws; but is in the Province Law Book, printed in 1726, p. 35. The words are these: "And whereas, by the precedent or form of an execution, the officer is commanded, for * want of goods, [* 477] chattels, or lands, of the debtor, to be by him shown or found within the precinct, to take the body of such debtor and commit him to prison, it is hereby *explained*, enacted, and *declared*, by the authority aforesaid, that, where judgment is granted for money, or for any particular specie, *the creditor shall not be compelled* to take any other specie; but in every such case, for want thereof, the officer shall take the body of the debtor in execution, and imprison him, unless such creditor shall be content to receive his satisfaction *in* such other estate as may be tendered or found. And these words, *to the acceptance of the said A. B.*, shall be supplied and inserted in the body of the writ of execution, to follow next the word *precinct*."

There is not the least intimation given that the officer was to raise the money by the sale of the debtor's estate; but, on the contrary, it plainly appears that the makers of this act thought that, upon the old writ, the creditor was obliged to take his satisfaction *in* such estate of the debtor as was tendered or found, or go without satisfaction; which could not be the case, if the officer was obliged to raise the money by the sale of the estate; and therefore they enact that, where judgment is for money, he shall not be *compelled* to take any other specie; but, for want of it, the officer *shall* imprison the debtor, unless the creditor is content to receive his satisfaction *in* such other estate as may be tendered or found; but do not add, or unless the officer can raise the money by sale of the other estate, or words to that effect; as they doubtless would have

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done, had they supposed he was obliged to do it, if the creditor chose he should, rather than receive the estate or have the body imprisoned.

It is plain, also, that the makers of this act thought that the insertion of these words, "to the acceptance of the creditor," in the execution, would give the creditor, for want of the money being paid by the debtor, his election to receive his satisfaction *in* other estate, or to have the debtor imprisoned until he paid the money; and they intended it should have that effect, and therefore the present writ ought to be so construed and understood, especially as this is the sense put upon it by an explanatory act. (2)

[*478] *In *England*, the creditor has his election, and makes it by suing out the *elegit* or *capias ad satisfaciendum*; and here the same election is given him, although both these writs are included in one. As on the *elegit*, the sheriff could not extend the lands, if there were goods and chattels enough to answer the debt, &c., so the act of 8 *Will.* 3, c. 3, subjects the land to be taken in execution, unless the debtor or his attorney tenders the officer personal estate sufficient to pay the debt, &c.

But this doth not take from the creditor his election of receiving his satisfaction in the estate tendered or found, or having the body imprisoned; nor doth it empower the officer to sell the estate tendered, unless the tendering of it to him be considered as an evidence of the debtor's consent that he should sell it, which it ought not to be. For the debtor may well be presumed to choose to pay his creditor in his personal estate, at the appraised value, rather than in his real estate, especially as then he could not redeem either; † and to choose to take the chance of being taken and imprisoned, until he raised the money by pawning, mortgaging, or selling his estate, to the best advantage, rather than to put it in the power of an officer to sell it for the most it would fetch, perhaps for half its value.

Again, if the legislature had designed that the sheriff should sell a *living* debtor's estate, and thereby raise money to pay the debt, &c., they would not have made the precept in the form they did; but would either have expressly required him to sell it, or to have done that which could not have been done without selling the estate, as is done in the *levari facias* or *fieri facias*; or would have expressly empowered him, by some law, to sell a debtor's estate as they, by 2 *Anne*, c. 5, empowered him to sell the estate of a deceased debtor; where the creditor had judgment and execution

(2) *Carth.* 396. — 10 *Co.* 101. — 11 *Co.* 73. — 4 *Bac. Abr.* 650.

† The right of redeeming real estate taken in execution was not provided until the act of 12 *Anne*.

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for money, and was not content to receive satisfaction in the goods or estate of the deceased, at an appraised value. Here the creditor has his election to take his satisfaction *in* the estate, or in the proceeds of the sale of it; but in the former case, to have the estate, or his body imprisoned; which would oblige him to raise the money to pay the debt. And because the body of an executor or administrator * could not be imprisoned for the de- [* 479] ceased's debt, and he thereby be compelled to pay the money, the legislature, agreeably to the spirit of the explanatory act aforesaid, in order to prevent the creditor's being obliged to take his satisfaction in the estate of the deceased, at an appraised value, enabled the sheriff to sell it, and thereby to raise the money and pay the debt. There is a good reason for the sheriff's being empowered to sell a deceased debtor's estate, which doth not hold good in the other case. What reason can be assigned for the sheriff's being so expressly empowered by this act to sell in this case, if he was before, by the writ of execution, or any prior law, empowered to do it? Surely no good reason can be assigned for it. The words of the execution, so far as respects the estate, are the same in both cases.

The legislature hath, in many cases, empowered officers, as well as others, to sell estates; but then it always hath been done by express words, plainly and clearly giving them power so to do. From hence may be deduced an additional argument, to prove that they did not intend, by our writ of execution, to empower the sheriff to sell any debtor's estate.

By our writ of attachment or *capias*, the sheriff, his under sheriff or deputy, are commanded to attach the goods or estate of a supposed wrong-doer, to a certain value, &c., and for want thereof to take his body, so that they have him at court, to answer the plaintiff, and to make return of their doings. And by the act of 13 *Will.* 3, c. 15, the estate so attached is not to be discharged until thirty days after judgment for the plaintiff, to the intent that he may take the same by execution for satisfying the judgment, so far as the value thereof can extend, if he think fit, unless the judgment be sooner or otherwise satisfied. And the same act provides that, if the body be taken and imprisoned on that writ, it shall be held the same time after judgment for the plaintiff, that it may be taken in execution, if the plaintiff do not order the sheriff to discharge him before. The difference in the mode of expression in the same act is observable. The body is to be held, *that it may be taken in execution;* the estate is to be held, that the plaintiff *may take the same in execution* to satisfy the judgment, *so far as the value*

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thereof can extend, if he think fit; that is, if he chooses to receive the same at the appraised value.

[* 480] * This act strongly implies that the judgment may be satisfied within the thirty days, otherwise than by the estate attached, or the body's being taken in execution. And the act of 6 *Geo.* c. 2, expressly empowers the creditor to cause the judgment to be otherwise satisfied; for it is thereby enacted, that when any person recovers judgment for money or any other specie, and the debtor is either unwilling or unable to satisfy the judgment by money or other specie, and the creditor, finding no other personal estate to his acceptance, doth therefore think fit to levy upon the real estate of the debtor rather than on his person, the officer shall cause the same to be appraised and set out by three persons appointed and sworn as the act directs, and deliver the creditor possession thereof, and make return thereof accordingly And if the estate cannot be divided and set out by metes and bounds, then he shall extend the rents, &c.

This act extends to all cases where the debtor is unwilling or unable to pay the money, or other particular specie which the judgment is for; and his not paying it, especially if demanded, will be evidence of his being either unwilling or unable to do it; and therefore it must extend to the cases where the body or estate is taken upon the *capias* or attachment, and the thirty days not expired. For the debtor's being in prison doth not show him to be able or willing to pay the money, nor doth the officer's attaching the estate, although by direction of the plaintiff, show that when the plaintiff has recovered judgment, he is content to receive his satisfaction in the estate so attached, rather than in other estate of the debtor, or rather than the debtor's body should be imprisoned until he pays the money, which this act intends by levying on the person of the debtor. This act also alters the condition upon which the real estate may be taken upon execution by the 8 *Will.* 3, from a tender to an acceptance, and giving the creditor his election to take his satisfaction in any part of the debtor's estate, real or personal, or to have his body imprisoned until he pays the money. As the creditor has his right of election, so the debtor, in consequence thereof, has a right to his liberty, if goods, chattels, or lands, are shown or found to the acceptance of the creditor, to satisfy the judgment, &c. And it is at the peril of the officer, that he infringes the right of the one or of the other.

[* 481] * As the officer's duty, as well as the debtor's right, depends upon the creditor's election, the officer cannot possibly know what he ought to do; and therefore, neither in rea

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son or law, is obliged to act, until that election is expressly made, or by some act of the creditor is reasonably supposed to be made. If the creditor, instead of the money, is willing to accept the debtor's goods, chattels, or lands, in satisfaction of his debt, it is the officer's duty therewith to cause him to be satisfied; but if he is not willing, it is the officer's duty, for want of the money, to take the debtor and imprison him. As soon as the officer has the writ of execution, he ought to know what he has to do by force of it, or at least the first step he has to take; and if that depends upon the will of the creditor, he only can, and therefore ought to make it known to the officer, as soon as he delivers him the writ.

The debtor is allowed twenty-four hours after judgment to pay the money, and thereby prevent the execution's issuing against him. If he does not pay it in that time, it is to be supposed that he cannot or will not do it. Whereupon the execution issues in the form prescribed, wherein no mention is made of the money's being to be paid by the debtor, or of its being demanded of him. The officer therefore is not obliged to demand the money of the debtor, or even to let him know that he has an execution against him, before he arrests him or takes his estate. The first step, therefore, the officer is to take, is to find and take the debtor's body or estate. If the officer, by force of the writ, has a right to take the debtor's goods and chattels, and doth take them to the value of the debt, &c., the debtor may be thereby discharged of the debt, and the creditor obliged to look to the officer. (3) For if the officer is not obliged to seek for any estate which, when found, is not lawful for him to take — and he has no right to take the estate unless the creditor is content to receive it instead of the money; and he is a trespasser if he doth it against the will of the debtor — it cannot be thought reasonable that the officer should be obliged to find and take the debtor's goods and chattels from him, and carry them to the creditor, or keep them until he will come to see if he is content to receive them, at the value they may be appraised at, instead of the money; and if he will not, that the officer
* should be obliged to return them back to the debtor, [*482]
or to his house, and then look out for the debtor and
imprison him. The creditor may as well say that he will not make his election until the estate, real or personal, is appraised; whereas, by the act of 6 *Geo.*, it is plain that the election must be before the appraisement; because it is upon the creditor's *thinking fit to levy* on the real estate, that the officer is to cause it to be appraised, set out, and delivered to the creditor. Indeed, if he thinks an unrea

(3) 2 Lord *Raym.* 1075.

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sonable value is set upon the estate, he may apply to the court whence the execution issued, to prevent the officer's return being filed and recorded; and upon just cause being shown, they will not allow it to be done, and then the creditor may have an *alias* execution. But if the officer returns that he has caused the estate to be appraised, &c., and has delivered possession thereof to the creditor, and the return be filed and recorded, the creditor is bound thereby; but may have an action of ejectment to recover the land, if possession thereof was not actually given him; and that return will enable him to do it, if the land was the debtor's in fee when extended. (4)

Upon the whole, the creditor ought to make his election as soon as the officer has the writ of execution; and if he delivers or sends the execution to him, without declaring his being content to receive satisfaction in the debtor's estate, or giving the officer any direction concerning it, it is to be presumed he is not content to receive his satisfaction in any other estate of the debtor than money. For his willingness not appearing when it ought to appear if he were willing, he, in judgment of law, is not willing, according to the rule, "that which doth not appear is not;" especially as the officer must, for want of the money, take the debtor and imprison him, if to be found; which is esteemed, in reason and in law, the highest and best execution, and the most forcible. (5) If goods, chattels, or land, were taken, the creditor must appoint one of the three appraisers; for the officer on an execution cannot determine the value of goods, chattels, or land, any more than the sheriff in *England* can the price and extent on the *elegit;* and therefore he must find the value by the verdict of a jury, that being the rule at common law, unless that rule be altered by some statute or law of the province.

[* 483] * Now, although there is no act of Parliament, or of this province, touching this matter, that expressly mentions goods or chattels, yet, as the act of 6 *Geo.* directs that the value of real estate taken in execution shall be determined by three freeholders under oath, one of whom to be appointed by the creditor, it may be reasonably supposed that the makers of that act intended that the officer should observe the same rule with regard to goods and chattels; and therefore that act is, by an equitable construction, extended to goods and chattels.

So that, if the creditor is content to receive his satisfaction in goods and chattels or lands, he must appoint one of the persons to appraise the same. And he must also, by himself or some one else, receive the goods and chattels, after they are appraised; for the

(4) 1 Lord *Raym.* 346. — *Cro. Jac.* 246. — *Holt*, 348. (5) *Hob.* 61.

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officer is not obliged to carry them to the creditor, whatever they are, or wherever he may be. And therefore, if the creditor points out no particular estate, nor nominates or appoints any person to appraise the estate, that may be found, or to receive it for him, nor gives any particular directions concerning it, it is reasonable to suppose he has no thoughts of taking any thing but the money or body, although goods, chattels, or lands, were attached, even by his order, on the original writ. For he is not obliged to take them after judgment, as appears above; and a creditor may, and often doth, think himself in danger of losing his debt, and therefore directs the officer to attach estate, which he would be very unwilling to take at the appraised value instead of the money, if he had any prospect of getting the money in any other way. Sometimes, too, he directs estate to be attached which he only suspects to be the debtor's, and which, before judgment, he finds that the debtor had no right in. As, therefore, the creditor is not obliged to take the estate in execution, which was attached by his order on the original writ, so neither is any attachment of the estate of the debtor any evidence of the creditor's being, after judgment, content to receive it in satisfaction of his debt, to justify the officer's taking it by the execution, much less to oblige him to do it. (6)

It has been said that the sheriff, his under sheriff, and deputy, are but one, and that the official acts of either are, in law, to be considered as done by the sheriff himself. If this be law in this province, it affords a very strong argument [*484] that the plaintiff's directing an officer to attach estate on the original writ is not, without further directions, such evidence as will make it the officer's duty to take it upon the execution For the rule must be the same, whether the execution be delivered to the person who made the attachment, or to another. Suppose, then, the sheriff of *Middlesex* attaches estate, by force of a writ returnable to the inferior court in *Worcester*, and returns it; and judgment is rendered, and the execution issues thereon, and is sent to a deputy sheriff living at the extreme part of the county of *Middlesex*, adjoining to that of *Worcester*, within the thirty days, without any special directions, or notice given that any estate was taken on the original writ, and the deputy is wholly ignorant of the fact, and doth not take it, but looks out for the person of the debtor; is he guilty of any fault, or is he subject to an action, when he is guilty of none? Or is the sheriff in fault for not taking the estate by the execution, when he had it not; or is he subject to an action for not doing that which, without any fault of his, he never had it in his

(6) See 11 *Mass. Rep.* 320, *Lyman vs. Lyman & Al.*

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power to do; or for the default of his deputy, who had not been guilty of any? Surely, natural justice forbids it; and therefore he who affirms it must show some clear, positive, and express law, subjecting the sheriff to an action in such case, before he can be believed.

It may, and frequently does, happen, that attachments are made by one person, and the execution delivered to another. But then, if the creditor would have the estate which was attached taken in execution, he informs the officer to whom he gives the execution of it, and directs him to take the estate in execution. And, surely, it is much more reasonable that the creditor should let the officer know, when he delivers him the execution, that he is content to take his satisfaction in the debtor's estate, than that the sheriff should be obliged to give notice to his under sheriff and deputies of what he doth on every writ of attachment, and that they should be obliged to do the like to him and to each other; which must be done, to save the sheriff from being subject to an action, in such a case as is before mentioned, if the law be as is suggested.

In *England*, where the writ is directed to the sheriff, [* 485] and returned * by him only, (6) it may be reasonably supposed that he knows what is done by himself, or by his under sheriff or deputies, who make return of their doings to him, for him to make his return by. But here, where the writs are directed and delivered to the deputies as well as the principal, and are executed and returned by them to the court, according to the command therein, it cannot reasonably be supposed that he should know what they have done, or they what he and each other have done. The creditor must therefore make his election after judgment, although estate may have been attached, by his order, on the original writ.

The other four judges were of a different opinion. They declined giving their opinions at large, as Judge *Trowbridge* had done, but seemed to ground themselves upon the contemporaneous exposition of our laws, and the uninterrupted practice of the province; which they conceived to have been contrary to Judge *Trowbridge's* opinion.

Judgment was thereupon rendered for the plaintiffs, from which the defendant claimed his appeal to the king in council.

Note. — It was probably in consequence of the doubts raised by this argument and opinion of Judge *Trowbridge*, that an act or law of the province was shortly after made, empowering officers to sell goods and chattels, taken by execution, at public vendue. See *Ancient Charters, &c. of Massachusetts Bay*, 675.

(6) *Dalt. Sher.* 95, 181

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* The following cases are taken from notes of the late Hon. WILLIAM CUSHING, who was seventeen years one of the justices of this Court, twelve of which he was Chief Justice. For their insertion here, the public are indebted to WILLIAM C. AYLWIN, Esq., a counsellor of the court, and nephew of Chief Justice CUSHING.

ESSEX, NOVEMBER TERM, 1787

JONATHAN WALDO *versus* FITCH HALL.

DANIEL PARKER, by indenture, leased land, &c., to the defendant, who assigned the same to the plaintiff in these words: "grant, bargain, sell, assign, and set over, to said *Waldo*, his executors, administrators, and assigns, the whole of the premises and appurtenances within mentioned; — to have and to hold during the term of time in said lease mentioned, he, the said *Waldo*, performing all covenants," &c. Prior to making the lease, *Parker*, the lessor, had mortgaged the same lands, &c., to one *Fitch*, who, after the lease and the assignment, ejected *Waldo*, and took possession, by virtue of his prior mortgage. And for this eviction the plaintiff brings this action of covenant against *Hall*, his assignor, upon the said assignment, declaring thereon as [importing] a covenant, "that he [*Hall*] had power to demise and assign the premises as aforesaid; and that the said *Waldo* should hold against all holding under *Parker* and *Hall*."

Upon general demurrer to the declaration and joinder, two exceptions were taken: —

1. That this being but an assignment of a term, the action does not lie for the assignee against the assignor for any acts done by the lessor; but the action is good only against the lessor.

2. For variance between the declaration and the words of the assignment. *Vide* the words of each, recited above.

Wetmore for the plaintiff. *B. Lincoln*, Jun., for the defendant.

Upon a continuance *nisi*, judgment was declared in December following, at an adjourned term in *Boston*. Present, *Cushing*, C. J., *Sargeant* and *Sumner*, justices.

* This is covenant by an assignee against an assignor, upon an implied covenant in law, for an eviction by an elder title derived from the original lessor. And the Court are of opinion that the action does not lie. For, 1. It appears the intent [*487]

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of the parties only to assign the term. The assignment being written upon the lease, the assignor says he assigns "the within-mentioned premises for the term mentioned in the lease, *Waldo*, the assignee, performing all the covenants;" which seems intended merely to put the assignee into the place of the assignor, with all benefits and burdens attending the original lease; whereby there becomes the same privity in general between the assignee and the original lessor as between the lessee and the lessor; and the inherent covenants go with the lands, in whose hands soever the lands come.

2. There is no instance produced, nor can we find any, of an action by an assignee against an assignor, *upon a covenant in law*, for an eviction in consequence of an act done by the original lessor; although there are express resolutions that it lies for the assignee against the assignor upon express covenants.

In the case of an under lease for a less term than the original term, reserving rent to the lessee, without any reference to or notice taken of the original lease, there it is the same as an original lease between the parties, and the first lessee may have debt for rent against his lessee, or distrain. But the case is totally different upon a bare assignment of a term. Vide 3 *Bac. Abr.* 398, 399; and, among other authorities, *Spencer's* case, 5 *Co.* 16, where, by the fourth resolution, by the word *concessi*, or *demisi*, the assignee of lessee, if evicted, shall have covenant against the lessor; but no intimation that he may have it against assignor. Again, 3 *Lev.* 233, if A leases to B, rendering rent, and B *covenants* to pay it; and after B assigns to C, and A grants the reversion to D, and D after accepts rent from C; yet for non-payment at another day, D may have an action against B, the lessee, it being upon *an express covenant*; which seems to imply that, without an express covenant, the action against the lessee was gone after assignment. And although that was in case of a reversioner, and not of an assignee against the assignor, yet it tends to illustrate the general doctrine,

[* 488] that an assignment alters and transfers the * privity of contract from the original parties, founded merely upon implication of law.

The case being decided upon the first exception, no opinion was given upon the second.

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HAMPSHIRE, APRIL TERM, 1779.

PRESENT:
CUSHING, CHIEF JUSTICE.
FOSTER, SARGEANT, SEWALL, AND SULLIVAN, } JUSTICES.

FREARY & AL. *versus* COOKE.

TRESPASS for breaking and entering the plaintiff's several fishery in *Connecticut* River, and taking thereout 300 shad and 50 salmon. This action came on to be tried in this county at September term, 1770, when a special verdict was found, in substance as follows, *viz.:* That *Connecticut* River is a certain ancient, navigable river; that there is an ancient custom among the inhabitants on said river, that when any one of them cleared a place for seine-fishing, he held it against every body during the fishing season; and that, in the year 1767, the plaintiffs entered and cleared the place where the alleged trespass was committed, in front of the defendant's upland, and prepared it for a seine-fishery; and had used it ever since at proper seasons. It was further found, that the defendant, at the time when, &c., took the fish specified, &c. And if on the whole matter, &c.

This special verdict was first argued at *Springfield*, September term, 1773, before *Oliver*, C. J., *Trowbridge*, *Hutchinson*, *Ropes*, and *Cushing*, justices; and was continued from term to term for advisement, until the dissolution of the provincial government; and after the reorganization of the judiciary, was argued again before this Court.

The following is a condensed sketch of these arguments: —

Hawley and *Strong*, for the plaintiffs, argued that their *claim, arising from this special verdict, was [*489] of an exclusive right of fishing; that the plaintiffs had such an estate as the grantee has, from one who grants the right of fishing only, and retains the soil.

They considered, — 1. Whether the special verdict did not support the proposition, that the plaintiffs possessed a several fishery, and its incidents; if not, 2. Whether the custom found did not entitle them to judgment on this verdict.

In *Co. Lit.* 4, *b*, it is laid down that a grant of *aquam suam* passes a *several fishery*. This is, in fact, what the verdict finds the plaintiffs to possess. Can such a right exist, to exclude the owner

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of the soil? In order to determine this, the nature of a several fishery ought to be examined.

There is some confusion in the different cases reported, happening, probably, from not distinguishing between a *common of fishery, free* and *several fishery*. The difference between them, however, is well explained in 2 *Black. Com.* 39, 40, where it is stated that a *free fishery* is an exclusive right of fishing in a public river, and derived by a grant from the crown; a *several fishery* is also an exclusive right, but derived from the owner of the soil; and a *common of fishery* differs from the others in not being exclusive. This definition is, indeed, at variance with *Coke's* Comment., (*Co. Lit.* 122, *a*,) where he asserts a free fishery and a common of fishery to be the same, and quotes 2 *Rol. Abr.* 267, in support of his opinion. But in *Fitz. N. B.* 200, there is to be found a writ of trespass in a free fishery, which would not lie for a common of fishery; there being in that case no special property in the fish until they are caught — Vide *Smith* vs. *Kemp*, 2 *Salk.* 267. — 1 *Lev.* 253. — 2 *Lev.* 2. — It therefore may be inferred, that a *free fishery* and a *several fishery* are one and the same, in the particular of being exclusive rights.

By the charter of *Will. & Mar.* the property of the river is vested in the inhabitants of the province; and this the Court are bound to take notice of, without being found by the jury; and the inhabitants having modified this property by the custom stated in the verdict, "that when any one cleared a place for fishing, he held it against every body," the Court must recognize
[*490] the plaintiffs' right to a several or free fishery, and *affirm the verdict, which, in fact, finds that they have such an estate.

If the Court, however, should be of opinion that this right cannot be supported by these authorities, to exclude the owner of the soil, the *custom* found will be sufficient to maintain the verdict. This leads to the second head of inquiry proposed in this case.

The custom stated has the essential of a good one, in a reasonable commencement. It is founded on the best of all titles, "*labor and expense;*" inasmuch as the verdict finds, "that the plaintiffs entered and cleared the place for seine-fishing." — 2 *Black. Comm.* 6, 7. — It possesses another essential feature of a good custom, "that it has been continued ever since at proper seasons." And in such cases, although it be contrary to common law, or against the interest of an individual, yet it shall be valid. — *Co. Lit.* 110.

Putnam and *Worthington*, for the defendant, moved two questions to the Court, — 1. Whether the plaintiffs, by the verdict, have a several fishery; 2. Whether the custom is good.

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As to the first question, it was insisted there could be no doubt that this was not a *several fishery;* for by the verdict it appeared that the plaintiffs were not the owners of the soil. According to 2 *Black. Comm.* 39, 261, and *Salk.* 637, he that has a several fishery has the soil. It is a prerogative of the crown, vested in the owner of the water. And, by the authorities cited, it is evident that the proprietors of both sides of the river shall have the soil to the middle, when it dries up. This is certainly incompatible with the doctrine attempted to be supported for the plaintiffs; and therefore they cannot have a *several fishery.*

There is a manifest distinction between a *free fishery* and a *several fishery.* The former is a royal franchise; and it is certain, from 2 *Black. Comm.* 417, that none can have been granted since the reign of *Hen.* II. It is against common right, that fishing in public navigable rivers should belong to the crown or any individual.

To support the verdict by the *custom* is impossible. It militates with the charter which gives the right of fishing to the inhabitants of the province generally; and therefore the
*custom could not have a reasonable commence- [*491]
ment. It is an uncertain custom; it savors of arbitrary power; and is in derogation of the rights of the subject; and therefore void. Vide 1 *Wils.* 64, *Wilkes* vs. *Broadbent.* — 2 *Strange,* 1224. — *Cro. Jac.* 357.

Judgment was finally given, at this term, for the defendant The Court, in deciding the case, did not enter into the arguments relative to the question, whether it was a *free* or *several* fishery; but considered the custom absolutely void, from its uncertainty and unreasonableness.

SUFFOLK, FEBRUARY TERM, 1780.

SAMUEL DANFORTH *versus* DANIEL SARGEANT AND ANOTHER

THIS was an action of trespass *quare clausum fregit.* Issue not guilty. The defendants had hired the premises of the plaintiff for a year, terminating the 13th of April, 1779, and held over until the 20th of May following, notwithstanding being warned out by the plaintiff; and they insisted that they had a right to retain possession until ejected by process of law.

The Court held the defence to be frivolous, and stated that the

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law was clearly otherwise. The lessor, after the term is ended, may enter at pleasure and order the lessees out; and if they hold over, there is no question that it is a trespass. They accordingly directed a verdict for the plaintiff.

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* WORCESTER, OCTOBER TERM, 1782.

PRESENT:
CUSHING, CHIEF JUSTICE.
SARGEANT, SEWALL, AND SUMNER, } JUSTICES.

COX AND OTHERS *versus* EDWARDS.

THIS was a real action, commenced in the year 1773; and on the trial at September term, 1780, an objection was taken to the admission of a deed from *Daniel Cox* to his son *Daniel*, of *Trenton*, granting to him in fee the demanded premises, in consideration of natural affection and of five shillings. The deed bore date in 1701, and was recorded in this county in 1755; but had never been acknowledged by the grantor. It appeared, by a memorandum on the deed, that, in 1726, before the mayor of *Philadelphia*, one of the witnesses swore to its execution in *London* by the grantor; and a record thereof was made at *Burlington* county court. It further appeared that the land had been in an uncultivated state, until within twenty or thirty years.

CUSHING, C. J., instructed the jury that the objection taken to the admission of the deed, because the grantor had not acknowledged it, and because no evidence was offered of livery of seisin, was, in the opinion of the Court, unsupported by the law of the land. It was true that the requirements of the province law had not been complied with, and that there was no proof of actual livery of seisin. But this deed was not such a one as was comprehended within the provisions of that act, which requires acknowledgment and recording. For it had all the qualities of *a deed to uses*; and by the statute of uses, the possession was transferred to the use, immediately on the delivery of the deed. This opinion had been frequently held by great lawyers in this province, and he knew of no judgment of court to the contrary.

The particular reason, in his opinion, why it was not included in

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the province law was, that, taking the whole of the act together, it intended to require the acknowledgment and recording of deeds only where livery of seisin was necessary * to make the conveyance good. For the act provides that all deeds, &c., acknowledged and recorded, shall make *a good title, without any other act or ceremony whatever;* plainly referring to the ceremony of livery of seisin. Now, livery of seisin was unnecessary to the completion of a deed to uses. And thereupon he recommended to the jury to find a special verdict, in order that the matter might be more fully considered. [* 493]

The jury accordingly returned a verdict, in which they found "that *D. Cox*, late of *London*, physician, on the 28th of June, 1701, was seised of the demanded premises in fee; that, being so seised, at said *London*, he on the same day made and executed to the said *D. Cox*, of *Trenton*, esquire, (on whose seisin the demandants have counted,) a deed of the same, with other lands, in manner and form as appear from the writings and attestation annexed to the same deed which is in the case; and thereupon prayed the advisement of the Court; and if the Court were of opinion that the said deed, made in manner aforesaid, was sufficient in law to give the said *D. Cox*, of *Trenton*, seisin of the premises, and that thereby an estate in fee vested in him, then the jury found that the tenant did disseise the demandants, as they complain; otherwise," &c.

This verdict was argued several times by *Paine* for the demandants, and *Sprague* and *Lincoln* for the tenant; and the opinion of the Court was delivered, at this term, to the following effect, by

CUSHING, C. J. The question arising upon this special verdict is, whether the deed from *Daniel Cox*, wherein he granted the premises to his son, gave the seisin, and vested the fee thereof in him and his heirs, by the operation of the statute of 27 *Hen.* 8, commonly called the statute of uses, notwithstanding the provisions of the province law of 9 *Will.* 3, c. 8.

This deed may be considered as a covenant to stand seised to uses, according to 1 *Lev.* 55, where it is agreed that the words *give* and *grant* operate as such covenant. It is, then, necessary to inquire whether a conveyance of this kind is within the purview of the province law.

The first clause of the act provides that all deeds or conveyances of houses or lands, acknowledged and recorded as * is therein required, shall be valid to pass the same, *without any other act or ceremony;* meaning, as I apprehend, without livery of seisin, which was indispensable at common law. The next clause enacts that no bargain, sale, mortgage, or other conveyance, of houses or lands shall be good to hold such [* 494]

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houses or lands against other persons than the grantor and his heirs only, unless such deed be acknowledged and recorded. Now, comparing this with the first clause, it does seem that the legislature intended no other conveyance than those which the act or ceremony of livery of seisin was necessary, at common law, to render valid. And that ceremony was unnecessary in a deed to uses, because, by the statute of uses, the possession is immediately transferred to the use.

But it is said we are to consider the preamble, which is a key to the sense and meaning of the legislature. There we find the law expressly enacted, *to prevent clandestine and uncertain sales, &c., and to the intent that it may be the better known what right and title the vendor has.* Then comes the provision of the act, *that all deeds acknowledged and recorded shall be valid to pass the land, without any other act or ceremony;* which is followed by the second clause, where it is provided that no bargain, sale, mortgage, or other conveyance, shall be good, unless acknowledged and recorded. These words, "or other conveyance," are certainly comprehensive enough to take in deeds to uses; and the mischiefs struck at in the preamble, (*i. e.*, purchasers being deceived and liable to be defrauded by clandestine sales,) are as applicable to, and as great from these deeds to uses, as any other conveyance whatever. By what rule, then, are we to exclude this species of conveyance, since they fall within the letter of the statute, and within the mischief intended to be remedied?

In answer, it is contended that this particular deed is not within the provisions of the law, as it was executed without this province, and the operation of the act is confined expressly to deeds executed within the province. The words of the act are, "that no bargain, sale, or other conveyance, &c., *made and executed within this province*, shall be good, unless acknowledged and recorded." This deed was executed in *London*, proved by one witness in a [* 495] court of record in a neighboring * government, and has been recorded in the county where the land lies. Under these circumstances, is it valid to pass the land? Being a deed to uses, it must be valid, unless controlled by our provincial statute; and if we are governed by the words of the statute, the question must still be answered in the affirmative, as the deed was executed without the province.

There is another clause of the act which it may be useful to consider, in deciding this case. It is a proviso that, if the grantor be dead, proving the execution of the deed by two witnesses shall be tantamount to an acknowledgment. Supposing this deed within the statute, the requisites of the law are not strictly complied with;

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but they are in substance. For what is the design of acknowledgment, but as proof of the execution of the deed, in order to its being recorded? At common law, the testimony of one credible witness is sufficient to prove any fact; and so it is in reason. And proof derived from a court of record of a sister state is as valid as proof procured from testimony in this state.

Further, this deed is as well authenticated by the evidence of one witness, taken before a court of record, and the recording, as deeds are required to be by the third section, when the grantor refuses to acknowledge them; in which case, leaving a copy only with the register, with the testimony of one subscribing witness, shall support the title.

But, finally, if these requisites of the law must be taken in their strict and literal meaning, by the same rule, the words "within the province" must be understood literally; and then the validity of the deed is not affected. And by this construction, the words "executed within the province" are not rejected as insensible; but have as operative a meaning given them as any words of the statute.

Upon the whole, as this deed has the principal notarieties required by the province law, although not every particular one, and thus substantially answers the object of the preamble, *to give notice of the title*, and considering it as not within the words of the statute, we cannot therefore give an opinion to invalidate this deed. Judgment must be for the demandants on this verdict.

[*496]

*MIDDLESEX.

Minot and Others *versus* Prescott.

This was an ejectment for land in *Middlesex*, wherein a special verdict was found; that one *J. Betton*, on the 17th of July, 1776, being seised of the premises, made his last will, and devised to his wife *Mary* the income of his real and personal estate during life; and *if not sufficient to support her comfortably*, then power to sell any of his estate for that purpose; and to will and dispose of all the wearing apparel, plate, and furniture, of which he should die possessed. It was further found that, on the 11th of December, 1776, the said *Mary* granted the premises in fee unto the defend

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ant, for a valuable consideration; and that, if evidence could be admitted (notwithstanding the deed to the defendant) to prove the income, &c., sufficient, &c., then that it was sufficient for her comfortable support. And whether, on the whole matter, the demandants could recover, the jury prayed the advisement of the Court, &c.

Hichborn, for the tenant, contended, — 1. That the will gave a fee to *Mary*, the wife. — 1 *Leon.* 283. — 2 *Wils.* 6. — 2. If not a fee, yet, under the power in this will, she was the sole judge of the insufficiency of the income, to support her comfortably; and no averment against the presumption of the insufficiency of the estate, arising from the making of the deed, ought to be allowed.

Lowell, for the demandants, cited Sir *W. Jones*, 137. *Cro. Car.* 335, *Dyke* vs. *Ricks*, S. C., where it was adjudged, on a will devising that, "if it plainly appear that sufficient goods and chattels cannot be found to pay debts, &c., then power to sell lands sufficient for that purpose, and no more," that the insufficiency of the goods and chattels was a condition precedent, and ought to be averred and proved.

CUSHING, C. J. This is not a fee simple. The power is not to dispose at will and pleasure, as in the case cited from *Wilson*, but on the happening of a particular event, *viz.*, the income proving insufficient to support the wife comfortably. This is a
[* 497] precedent condition; and was so adjudged in the * case of *Dike* vs. *Ricks*, where the clause in the will was substantially the same with that in the present case. The happening of this condition ought to have been stated in the deed to *Prescott*, as well as shown in the verdict, in order to entitle the defendant to judgment. It is a matter which can be traversed; and as the jury have found that there was a sufficiency of personal estate for the comfortable support of the widow, this conveyance cannot be supported. I am therefore clearly of opinion that the demandants ought to have judgment on this special verdict. And so adjudged *per Curiam unâ voce.*

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ESSEX, NOVEMBER TERM, 1780

PRESENT:
CUSHING, CHIEF JUSTICE.
SARGEANT AND SEWALL, } JUSTICES.

GRIDLEY *versus* HARRADEN.

THIS was an ejectment, pending several years in this Court; and in June, 1771, a special verdict was found, and argued by *Fitch* for the demandant, and *Adams* for the tenant; at June term, 1779, the verdict was set aside, and a new one found, which embraced more particularly the facts upon which the cause turned.

The verdict found that *Gridley* and one *Thompson*, deceased, being partners, brought their action against the now tenant at April term. 1768, to recover a debt, and attached the demanded premises by the original writ; that, having obtained judgment at November term of the same year, they sued out their execution against the tenant, and caused the premises to be set off to them in satisfaction thereof, and the sheriff duly gave them seisin and possession; and that *Harraden* afterwards entered on them.

The jury further found that, after the commencement of said action against said *Harraden*, and during its pendency, and before trial, one *A. Hall*, a creditor of the said *Gridley & Thompson*, instituted a process against the said *Harraden*, as agent
*and trustee of the said *Gridley & Thompson*, they [*498]
being then out of the province; and such proceedings were had thereon that judgment was recovered by said *Hall* against the goods, effects, and credits, of said *Gridley & Thompson*, in the hands of said *Harraden;* which he afterwards paid to said *Hall*, on an execution duly issued. And if upon the whole matter, &c.

This special verdict was now argued by *Pynchon* for the demandant, and *Lowell* for the tenant.

CUSHING, C. J., stated that a number of questions had been raised at the bar; but the principal one, which required a decision, was this: Whether a *credit*, after action brought to recover it, was an attachable interest, within the provincial law of 2 *Geo.* 2, c. 3.

It is objected, on the authority of *Babington* vs. *Babington*, *Cro. Eliz.* 157, and *Humphrey* vs. *Barns*, *Ibid.* 691, that this credit, *pendente lite*, could not be attached; and also that a judgment having changed its nature into a debt, it could not now be held, even if it

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were rightfully attached at first. After suit brought by these authorities, the debt is *quasi in custodiâ legis*, and cannot be arrested by this trustee process.

Another question is raised, whether the payment on the execution issued under the trustee process is not a satisfaction of the original execution, and has thus relieved the land from the levy. In support of the affirmative are cited 2 *Vent.* 327, *Cro. Jac.* 424, and *Cro. Eliz.* 734.

But the Court are of opinion that, while the original judgment, execution, and levy, are in full force, and apparently regular, no remedy can be given the tenant on this verdict. A matter of record cannot be set aside in a side-way by matter *in pais*. *Unumquodque dissolvitur eo ligamine quo ligatum est.*

However, as the attachment of this credit must have been known to the present demandant and his partner, and as it has been, in fact, applied to the payment of their debt, there seems to be great hardship in this case on the part of *Harraden*. The Court will therefore suspend judgment, in order that he may apply for an *audita querela*, to seek a remedy from an execution, which it appears irregularly issued.

Note. — The action was continued for about two years, and then the demandant became nonsuit.

[*499]

*SUFFOLK, AUGUST TERM, 1780

PRESENT:

CUSHING, CHIEF JUSTICE.
SARGEANT, SEWALL, AND SULLIVAN, } JUSTICES.

THE GOVERNMENT AND PEOPLE, &c., *versus* M'GREGORY AND EIGHT OTHERS.

THE prisoners were indicted for murder; and they filed a special plea to the jurisdiction of the Court, in which it was averred that the accused were prisoners of war, and subjects of the king of *Great Britain*, and not triable by courts who judge by municipal law, but ought to be tried by the laws of nations, and by courts-martial; and pray judgment if this Court, which proceeds according to municipal law, will further entertain jurisdiction of said

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indictment, &c. To this plea the *Attorney-General* demurred, which demurrer was joined by the prisoners.

Sumner, *Hitchborn*, and *Morton*, counsel for the prisoners, cited *Vattel*, b. 3, c. 8, § 137, 142. — 7 *Rep.* 6, *Calvin's* case. — 1 *Black. Comm.* 373. — 2 *Vin. Abr.* 264; and from thence argued that prisoners of war are entitled to no protection, and therefore owe no allegiance; that, owing no allegiance, they are not punishable by municipal law; and they quoted *Hawk. P. C.* b. 1, c. 17, § 6, to show that prisoners of war are to be dealt with by martial law.

But the Attorney-General, *Paine*, on the authority of *Foster*, 186, 187, contended that prisoners of war are amenable for an offence *malum in se;* and of course may be tried by the ordinary tribunals of justice in the country in which the crime is committed. This has been the practice in *England;* and although they may perhaps be tried also by courts-martial, that cannot oust the courts of law of their general jurisdiction. To which opinion *the Court* held, and, on deliberation, unanimously overruled the plea.

[*500]

*DENCH *versus* WALKER.

TROVER for four hogsheads of rum. On the trial, the evidence appeared thus: *Walker* undertook to transport from *Boston* to *Springfield* the four hogsheads of rum for the plaintiff. At the time of the delivery to *Walker*, the rum was good; but on its arrival at *Springfield*, it was much adulterated and greatly lessened in value; and whether it was thus adulterated by the defendant himself, or by his servant the teamster, did not appear. It was objected that trover did not lie in this case.

But *Cushing*, C. J., with the rest of the Court, held that it will lie. For the alteration of the quality of the liquor undertaken to be transported, whether it was done by the defendant or his servant, was an unlawful conversion. — Vide *Holt*, 528. (*a*)

(*a*) [*Commonwealth* vs. *James*, 1 *Pick* 375. — ED.]

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ESSEX, NOVEMBER TERM, 1785.

TOWNE *versus* COLLINS.

THIS was an action of *trover* for oxen. One *Hutchins* stole the cattle from the plaintiff, and sold them to *Collins*, who was not privy to the theft, nor had any knowledge of their being the property of the plaintiff. *Hutchins* was afterwards convicted of the theft, and sentenced, at the instance of the attorney-general, to pay threefold damages to the plaintiff, according to the statute. *Towne* had no other agency in the prosecution than procuring the arrest of the thief upon a warrant, and attending at the trial as a witness, upon being summoned.

The question referred to the Court was, whether the conviction and sentence were a bar to the plaintiff's recovering in this action.

The authorities cited were *Kel.* 35, 48, at the Old Bailey, 1664. — 1 *Mod. Rep.* 288. — *Bac. Abr.*, title *Trover*. — 2 *Rolle's Abr.* 557, pl. 24.

[*501] *Per Curiam, viz., *Cushing*, C. J., *Sargeant*, *Dana*, and *Sumner*, justices. There being no market overt here, and actual satisfaction of the threefold damages not having been made to the plaintiff, the conviction and sentence can be no bar to this action of trover. (*a*)

(*a*) [*Long on Sales*, *Rand's* edition, 164—175, and cases there referred to.— *Baldwin* vs. *Dame*, 8 *Mass. Rep.* 518.— Sed vide *Rowley & Al.* vs. *Bigelow*, 12 *Mass. Rep.* 307. — ED.]

SUFFOLK, FEBRUARY TERM, 1778.

HATHAWAY, Administrator, *versus* VALENTINE.

THIS was an ejectment, brought to recover possession of a certain messuage in *Bristol* county. The demandant counted on a seisin of his intestate; and that *Valentine* had unjustly entered, and now held him out from administering the same according to law. To this declaration there was a general demurrer and joinder at the last October term at *Taunton*, and the cause was continued *nisi* unto this term for advisement

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And now the Court were fully of opinion that the declaration could not be sustained; the majority of the Court inclining to think it bad, because it was not alleged that the personal estate of the intestate was insufficient to pay the debts, &c. But *Cushing*, C. J., was clearly of opinion that an administrator could not maintain any real action, unless it was to foreclose a mortgage; and this, he said, had been frequently ruled in the superior court; particularly in an ejectment decided at *Boston*, February term, 1758, before *Sewall*, C. J., *Lynde*, *Cushing*, *Russell*, and *Oliver*, justices, between *Goddard*, Admx., & *Goddard*. In that action, the administratrix declared that she was seised in her demesne as of fee of certain real estate in *Roxbury*, within, &c., in trust, in her said capacity, for the payment of her intestate's debts, pursuant to an order of court to aliene and dispose of the same in fee for that purpose; and being so seised, the defendant disseised her. And on a special verdict found, the Court determined that she could not recover; for an administrator has no such *seisin* nor *estate in fee*, but a bare authority. The authority, under the provincial law, which administrators obtain, by order of the superior court, to sell lands,
* was likened to the authority which executors have, [* 502]
where testators grant that the executors may sell; which
has always been held to be but a bare license. — *Co. Lit.* 112, *b*, 113, *a*, 236, *a*, 42, *a*. — And this authority may as well be executed, without an actual possession by the administrator as with one. There can therefore be no reason to maintain the action on that ground; and certainly there is no principle of common law to support it. (*a*)

(*a*) [See the *Revised Statutes*, c. 71, § 12, 13. — ED.]

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3. Where one had contracted, for a

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price agreed, to erect a bridge in a particular manner, and he executed it in so unfaithful a manner that, although it served its intended use for a time, yet, from the manner of building it, it gave way, and was finally carried away by a flood; he could not recover on the special contract, because he had not fulfilled it; nor for the value of the materials, because they never came to the use of the town. *Tufts* vs. *The Inhabitants of Montague.* 282

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1. Property was attached on mesne process, and delivered to keepers on their receipt and promise to redeliver the same to the officer on demand. On issuing the execution, and within thirty days from the judgment, the officer demanded the property without effect. On an alias execution, the judgment debtor was committed, and discharged, upon taking the poor debtor's oath. The keepers were still held liable to the officer upon their contract. *Bailey* vs. *Jewett & Al.* 155

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1. A banking company incorporated by the same name with a former one, and having appointed the same president and cashier, received and issued the notes of the former company, the officers of the new company frequently declaring that there was no difference between these notes and those issued by the new company. It was holden, that the new company were not thereby liable for the notes of the former company. *Wyman* vs. *Hallowell and Augusta Bank.* 58

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1. A fraudulent purpose or criminal act is essential to an act of barratry in the master of a ship. *Wiggin & Al.* vs. *Amory.* 1

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1. Where the drawer of a bill of exchange had effects in the hands of the drawee, but after the bill was drawn,

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and before it was presented for acceptance, the effects were attached in the hands of the drawee, the drawer was still held entitled to notice of the non-acceptance. *Stanton & Al.* vs. *Blossom & Al.* 116

2. Such notice is sufficient, if given within a reasonable time, although the holder commences his action against the drawer on the non-acceptance of the bill, before forwarding notice. *Ibid.*

3. But the notice must come from the holder of the bill, or from one authorized by him, or from one liable as endorser. Notice by the drawee, who has refused acceptance, is not sufficient. *Ibid.*

4. No action lies against one who had endorsed his name on a negotiable promissory note between other parties. *Burchard* vs. *Bartlett.* 279

5. Of the demand on the makers, and notice to the endorsers, of negotiable promissory notes. *Peirce* vs. *Butler.* 303

6. An infant made his promissory note, and when of age, being applied to for payment, acknowledged that the money was due, and promised that, on his return to his home, he would endeavor to procure it and send it to the creditor. This was holden to be a sufficient ratification of the original promise. *Whitney* vs. *Dutch & Al.* 457

7. Of two copartners in trade, one was an infant, and the other of full age: the adult, for a debt of the copartners, made a promissory note in the name of the copartnership or firm, and the infant, after coming of age, ratifies it; and it was holden good against him. *Ibid.*

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1. A bond given by the plaintiffs in replevin was holden sufficient, although bearing date the day after the service of the writ, although executed by two only of the plaintiffs in replevin, and although conditioned for a return of the chattels in like good order *as when replevied*, instead of *as when taken*. *Chandler & Al.* vs. *Smith.* 313

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1. A vessel was chartered for a voyage at a certain hire per month, so long as she should be continued in the service of the hirers, who were to victual and man the vessel and pay all port charges. On her passage home, she was captured as a prize, and detained several months; but was finally restored, and arrived at her port of destination. The owners were entitled to the hire, as stipulated by the charter-party, without any deduction for the time of the detention in consequence of the capture. *Spafford & Al.* vs. *Dodge & Al.* 66

2. The costs and charges paid by the hirer, in procuring the restoration of the vessel and cargo, were allowed as a general average on vessel, cargo, and freight, according to the value of each at the place of detention. *Ibid.*

3. The wages and provisions of the crew, during the detention, were not allowed as a general average. *Ibid.*

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1. The Court will not appoint commissioners of sewers, where all the proprietors of the lands alleged to be damaged join in the application. *Ex Parte Fearing & Al.* 367

COMMON, ESTATE IN

1. One advancing money to the constructor of certain machines, to enable him to accomplish the same under an

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agreement that the person so advancing his money shall have a share in the machines equal to the advances so by him made, becomes thereby tenant in common therein with the constructor. *Beaumont* vs. *Crane.* 400

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1. One deaf and dumb may be convicted of larceny. *Commonwealth* vs. *Hill.* 207

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1. To the validity of a coroner's bond for the faithful performance of the duties of his office, a formal approbation of the Court of Common Pleas on record is not necessary. *Apthorp, Treas.*, vs. *North & Al.* 167

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1. The certificate of the district judge of the United States Court, that an officer, who had seized property as forfeited, had reasonable cause for the seizure, has no operation to bar an action by the successful claimant against the officer for such seizure, unless the property be restored. *Hoit* vs. *Hook.* 210

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1. Where a *bonâ fide* purchaser of a vessel could have successfully defended and claimed against a forfeiture thereof for a breach of the embargo laws, committed before the sale; and on this ground the vendor was held not to be liable in damages to the purchaser, on the covenant against encumbrances, on the condemnation of the vessel. It was also holden, that the absence from the *United States* of both the parties, from the sale to the condemnation of the vessel, did not excuse the purchaser from his obligation so to defend and claim, or give him a better title to damages for the breach of such covenant. *Ingersoll* vs. *Jackson.* 109

2. A covenant to assign a chattel in as full a manner as A B had assigned it to the covenantor, does not necessarily imply that there shall be a covenant of warranty in such assignment. *Morrill* vs. *Worthington.* 389

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1. One who takes a conveyance of land, knowing that the grantor had previously conveyed it to another, cannot hold it against the first purchaser, although such prior conveyance be not recorded. But if the second purchaser procures his deed to be recorded before the other, and then sells the land *bonâ fide*, and for a valuable consideration, to a person ignorant of those circumstances, the latter will hold the land against the first purchaser; and this whether the conveyances be conditional by way of pledge, or absolute. *State of Connecticut* vs. *Bradish.* 296

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1. If a citizen of this commonwealth removes into another state, for the pur-

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pose of obtaining a divorce, upon a ground which would not justify a divorce here, a decree of divorce, so obtained, is considered as merely void, in this commonwealth. *The Inhabitants of Hanover* vs. *Turner*. 227

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DOWER.

1. A wife divorced for the adultery of her husband is entitled to dower in all the lands of which he was seised at any time during the coverture. *Davol* vs. *Howland*. 219

2. Where a husband received a conveyance of land in fee, and at the same time mortgaged it to a third person, and the mortgage was afterwards foreclosed, his widow had no right to dower, from such instantaneous seisin of her husband. *Clark* vs. *Munroe*. 351

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1. A judgment in an action of debt, brought upon a former judgment, which was erroneous, cannot be reversed for the error in the former judgment. *Hawes* vs. *Hathaway, in Error*. 233

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1. If, in the course of pleadings, the party who relies on matter of estoppel has no opportunity to plead it, he may show it in evidence; but when the matter to which the estoppel applies is directly averred or denied by one party, and the other takes issue on the fact, instead of pleading the estoppel, he waives the estoppel, and the jury are at liberty to find the truth. *Howard* vs. *Mitchell*. 241

EVIDENCE.

1. A secretary of an incorporated banking company is not a certifying officer: his copies must therefore be sworn to. *Hallowell and Augusta Bank* vs. *Hamlin & Al*. 178

2. Evidence of the testimony given by a witness in a former trial of the same cause, the witness having, in the mean time, been convicted of an infamous crime, is not to be received. *Le Baron* vs. *Crombie & Al*. 234

3. Jurors are not to be permitted to testify to the motives or inducements upon which they have joined in a verdict. *Bridge* vs. *Eggleston*. 245

4. The conduct and declarations of a grantor, respecting the estate conveyed, and tending to prove a fraudulent intention on his part, before the conveyance, is proper evidence for the jury, upon an inquiry into the validity of such conveyance, by a creditor, or subsequent purchaser, who alleges it to be fraudulent. *Ibid*.

5. A deed more than thirty years old may be given in evidence without proof of its execution, when found in possession of the party claiming under it, and the possession of the thing conveyed has followed the conveyance. *Stockbridge* vs. *West Stockbridge*. 257

6. In an action for charging the plaintiff with perjury, it is not competent for the defendant to give evidence that the plaintiff had constantly advanced atheistical opinions as the principles of his belief, in mitigation of damages. *Ross* vs. *Lapham*. 275

7. An inhabitant of another state is a competent witness, in the trial of an action to which such state is a party. *State of Connecticut* vs. *Bradish*. 296

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9. The maker of a promissory note is not a competent witness for the endorser, in an action by the endorsee against the endorser, unless released. *Peirce* vs. *Butler*. 303

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1. An execution may be extended on

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2. It was certified by a justice of the peace on an execution, that A. C. was sworn to appraise the real estate of the judgment debtor. B. C. made the appraisement; and the sheriff returned that he had caused B. C. to be sworn, &c.; and it was held well enough. *Ibid.*

3. Where the sheriff failed to certify, in his return of an execution, which he had extended on the real estate of the judgment debtor, that the appraisers were discreet and disinterested freeholders, the extent was held void. *Ibid.*

4. Where it appeared, on the return of an execution, that three appraisers were appointed and sworn, and that all the three had acted in the appraisement, although the certificate was subscribed by two only, and no reason given why the third did not subscribe, it was holden, that the return might be sustained. *Barrett* vs. *Porter*. 143

5. Where, at the time of the conveyance of land, a part of it was under attachment at the suit of a creditor of the grantor, and afterwards execution in the same suit was extended thereon, — this was held to be an encumbrance within the covenant in the deed, that the title was free from encumbrances. The extent was holden to be an eviction; and the appraised value of the land extended upon was made the measure of damages. *Ibid.*

6. A widow's right to have dower assigned to her in land is not subject to be taken in execution. *Gooch, Exr.*, vs. *Atkins*. 378

7. Where a judgment creditor caused his execution to be extended, by mistake, upon land not liable to be levied upon, and directed the officer not to return the execution, it was holden that an action of debt lay for him upon the judgment, without an eviction. *Ibid.*

8. An execution was extended on an undivided seventh part of a remainder in fee, the judgment debtor in fact owning but nine sixty-fourth parts; and it was holden sufficient to pass the debtor's estate. *Atkins* vs. *Bean & Al.* 404

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1. Where the administrator of a surety pays the debt, he may maintain an action in his own name against the principal, for indemnity; and the amount recovered by him will be assets in his hands. *Mowry* vs. *Adams*. 327

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1. Where the owner of a manufactory had mortgaged the building and appurtenances for carrying on the same, but still remained in possession, it was holden, that certain fixtures, which could not be taken out of the building without being first taken in pieces, were liable to attachment at the suit of the creditors of the mortgagor. *Gale* vs. *Ward*. 352

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1. Where the name of a trustee is collusively inserted in a process of foreign attachment, for the purpose of giving jurisdiction to the Court of Common Pleas in the county where such fictitious trustee dwells, the principal defendant may plead such matter in abatement. *Jacobs & Al.* vs. *Mellen and Trustees*. 132

2. Where, in a foreign attachment, the trustee had disclosed, but in a manner not satisfactory, and a further examination was ordered to be had before a justice of the peace, to which the trustee refused to submit, and before the next term the principal debtor and the trustee died, judgment was entered against both as of the preceding term. *Patterson & Al.* vs. *Buckminster and Trustee*. 144

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4. To an action of debt on judgment, in which also a trustee was summoned, the defendant pleads in bar, that the plaintiff had caused him to be committed to prison in execution of the judgment. The plaintiff replies that, after suing out his execution, he discovered goods, effects, and credits, in the hands of the

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supposed trustee, unattachable by the common and ordinary process of the law; whereupon he sued his writ in this case, and within seven days thereafter caused the defendant to be discharged from his imprisonment, according to the statute, &c. The defendant rejoins, that the plaintiff knew of the depositing of the said goods, &c., long before the commitment of the defendant, and might have attached the same; and that the said goods, &c., were, before the said commitment, for a valuable consideration, assigned, &c. Upon demurrer to this rejoinder, the plaintiff had judgment. *Dunning* vs. *Owen and Trustee.* 157

5. One may be holden as the trustee of another, on account of property in his possession, although such property may not be liable to be attached on mesne process, or seized in execution. *Clark* vs. *Brown and Trustee.* 271

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1. The establishing of a turnpike road over a general or common field is a dissolution of such general field. *Mansfield* vs. *Hawkes, in Error.* 440

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1. In a writ of right, wherein the demandants counted upon the seisin of their ancestor, the tenant proved that the ancestor had parted with the land in his lifetime; but it appearing that such ancestor was disseised at the time of the conveyance, and therefore that nothing passed by his deed, and the action being brought for the benefit of the grantees, the demandants recovered. *Knox & Al.* vs. *Kellock.* 200

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1. The bailee of a sheriff, who has received of him personal chattels attached, and given an accountable receipt for the same, with a promise to redeliver them to the sheriff on demand, has not such property in such chattels as will support an indictment for the stealing thereof from such bailee, as his chattels. *Commonwealth* vs. *Morse.* 217

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1. A person having a discharge under the insolvent laws of the state of *New York*, was holden liable for money received by him for the use of another, after his petition, and before the date of his certificate. *Pease* vs. *Folger.* 264

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1. A decree of the judge of probate, allowing the return of commissioners for dividing the real estate of an intestate among his heirs, &c., and who had assigned the whole to one, she paying to the other heirs respectively a certain sum, although void as to one of the heirs who had no notice, was held good as to another, who had assented to the assignment, and had received the sum awarded to her by the commissioners. *Rice & Ux.* vs. *Smith.* 431

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1. A justice of the peace was fined for not returning a recognizance taken by him, until the second day of the term. *Ex Parte Neal.* 205

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1. Foreigners, who have never been in the *United States*, are within the exception of the statute for the limitation of personal actions, and may bring their action within the time limited by the statute, after their coming within the state. *Hall* vs. *Little.* 203

2. The statute of limitations may be avoided, when pleaded by an administrator to an action for money had and received by the intestate, &c., by evidence that the plaintiff paid money to the intestate, as a consideration for land which the intestate promised to convey, and of which he put the plaintiff in possession; that he never made such conveyance; and that the plaintiff has been evicted by persons claiming under the intestate within the time of limitation; whereby the consideration has failed. *Eames* vs. *Savage, Admr.* 425

3. But whether such a contract can be proved by parol evidence, *quære.* *Ibid.*

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1. An action does not lie for an incorporated manufacturing company against a stockholder, for the recovery of assessments laid by the company. *The Franklin Glass Co.* vs. *White.* 286

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1. When the brigadier-general has endorsed a surgeon's certificate of the inability of a private in the militia to do military duty, it will be presumed that a previous application has been made to the commanders of the company and regiment. *Commonwealth* vs. *Fanning.* 290

2. The exemption of engine-men from duty in the militia applies as well to members of volunteer or independent companies as to those of the standing militia. *Commonwealth* vs. *Smith.* 374

3. But the right to such exemption is waived, if it exists at the time of the party's enlistment into such volunteer company. *Ibid.*

4. To avail himself of such exemption, it is not sufficient for the person claiming it to produce the certificate of his appointment to the commanding officer of the company after the day of muster or training. *Ibid*

5. The master of an enrolled vessel, employed in transporting stones, &c., from one part to another of *Boston* Bay, and occasionally making a short trip to sea for the purpose of fishing, was holden not to be exempted from militia duty, as a mariner in the sea service. *Commonwealth* vs. *Newcomb.* 394

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1. Of the rights of individual members of the *New England Mississippi Land Company* in the fund created by the act of Congress of March 31, 1814, entitled, "*An Act for the indemnification of certain claimants of public lands in the Mississippi territory;*" and of the authority of the commissioners appointed by the said act. *Gilman* vs. *Brown & Al.* 123

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1. A person, to whom, as a *non compos*, the judge of probate has appointed a guardian, is still liable to be sued in a civil action, and to be committed in execution. *Ex Parte Leighton.* 207

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1. A conveyance of parsonage land, from the parish to the minister in fee, was holden to be a void act. *Austin* vs. *Thomas.* 333

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1. A proceeding in the Probate Court, pursuant to an agreement between tenants in common, for partition of the estate, although incompetent to effect the partition, was held equivalent to a license from each of the tenants, that each might occupy the part assigned to him by such intended partition, so as to protect him from the penalties of the statute of 1785, c. 62, until the commencement of legal process for partition, which was holden to be a revocation of such license. *Pond* vs. *Pond.* 403

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1. It is the business of the assignee of a patent right to procure the deed of transfer to be recorded in the proper office. *Morrill* vs. *Worthington.* 389

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1. A registered vessel, bound coastwise from the port of *Boston* to another port of the *United States*, and from such other port to a foreign country, is a coaster within the exception in the statute of 1796, c. 85, § 2, for regulating pilotage, and so is not obliged to take a branch pilot on board. *Filley* vs. *Farrow.* 17

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3. If an original writ against the inhabitants of a town, of which a deputy sheriff is one, be served by the sheriff, it is a good cause of abatement. *Brewer* vs. *New Gloucester.* 216

4. It is a good bar to an action upon a replevin bond, that the plaintiff in replevin entered his action, that the Court of Common Pleas gave judgment against him, from which he appealed, and before the sitting of the court appealed to he died. *Jenney* vs. *Jenney.* 231

5. It is no bar to an action of debt upon judgment, that the bail of the defendant in the former suit had surrendered him, and that he was in prison by virtue of such surrender, and liable to be taken upon the execution, when the plaintiff commenced the second action, and arrested the defendant's body. *Clark* vs. *Goodwin.* 237

6. Non-tenure may be pleaded in bar; but if pleaded in abatement, the plea must be filed before the impanelling of the jury at the return term. *Otis* vs. *Warren.* 239

7. A plea in dower, that the tenant cannot render, &c., and concluding with praying judgment of the writ, that it may be quashed, is a plea in abatement. *Ibid.*

8. Under the provision of the statute of 1783, c. 42, § 7, a defendant in an action before a justice of the peace may avail himself of the statute of limitations under the general issue; the words *justification or excuse* in the statute meaning every matter which may bar the plaintiff's right to recover, whether requiring a special plea at the common law or not. *Williams* vs. *Root.* 273

9. If a feme sole administratrix marry pending an action commenced by her the suit abates. *Swan, Admx.*, vs. *Wilkinson.* 295

10. If, pending a writ of entry, the tenant be ousted by a stranger having a better title, or the land is recovered against him by a stranger, the writ will abate; but in both cases, the fact must be especially pleaded, as having occurred pending the writ, or since the last continuance. *Walcutt* vs. *Spencer.* 409

See ESTOPPEL, 1.
FOREIGN ATTACHMENT, 3, 4.
INDICTMENT, 2.

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POLICY OF INSURANCE.

1. Where a ship was insured on a mercantile voyage only, it was holden that the stopping to take possession of a prize, although there was no chasing, was sufficient to avoid the insurance; although it was known to the underwriter, at the time of his subscribing the policy, that the ship was armed, equipped, and commissioned as a letter of marque. *Wiggin & Al.* vs. *Boardman.* 12

2. Insurance was for twelve calendar months, with an agreement that, should the vessel be at sea at the expiration of that period, the risk was to be continued under the policy, at an agreed premium, until her arrival at her port of discharge. At the expiration of the year, the vessel was in a *British* port, whither she had been carried against the will of the master. A loss accruing afterwards in the further prosecution of the voyage, it was holden, that, being absent on a voyage which had been commenced within the time of the original risk, the policy continued to protect the property after the expiration of the year, although not then literally at sea. *Wood* vs. *N. E. Mar. Ins. Company.* 31

3. Where any loss arising from the violation of the *existing* laws or regulations of any of the belligerent powers, restricting neutral commerce, were excepted from the risks undertaken in a policy of insurance, it was holden, that the underwriters were liable for a loss arising from the violation of a decree of one of the belligerents, made after the execution of the policy. *Ibid.*

4. Insurance was made "on the cargo of the *Swedish* brig *Sophia*;" and it was holden, that the vessel was thus warranted to be *Swedish*, or at least documented in that character. *Higgins* vs. *Livermore.* 106

5. A vessel being *American* property, but having an ostensible *Spanish* owner and master, was insured from the *Havana* to the *United States.* In case of a loss, no proof of property was to be required, and no return of premium; and the assured agreed, in case of capture, to claim the property as *Spanish.* The vessel was captured and libelled as prize, but was finally restored. While she was under detention, the assured abandoned. After the restoration, the ostensible owner, instead of proceeding with the vessel to the *United States*, fraudulently took her on another voyage, without authority. It was holden, that the underwriters were not liable for the loss. *Smith* vs. *Touro.* 112

6. Where, in a policy of insurance, the underwriters acknowledge the premium paid, and the assured has afterwards a right to a return of the premium, he may recover the same in an action for money had and received, although, in truth, he gave his promissory note therefor, and the note is still unpaid. *Hemmenway* vs. *Bradford.* 121

7. Property was insured "on board the *Spanish* brig *New Constitution.*" The vessel was captured, and, with her cargo, was condemned as *American* property. It was holden, that the description in the policy amounted to a warranty that the vessel was *Spanish*; and that it was not competent for the assured to show that the underwriters were informed, at the time of their subscription, that she was in truth an *American* vessel, and was to be ostensibly *Spanish* for the purpose of avoiding capture by the enemy. *Atherton* vs. *Brown.* 159

See BARRATRY, 1.

POOR.

See SETTLEMENT

PRACTICE.

1. After a defendant is defaulted, judgment is entered of course, unless there be good reason for postponing it, as a prior attachment of property by other creditors. *Coolidge & Al.* vs. *Cary.* 115

2. A nonsuit is only to be ordered at a trial for the insufficiency of the evidence on the part of the plaintiff; not on evidence produced by the defendant. *Rose* vs. *Learned & Al.* 154

3. It is a good cause of challenge to a juror, in the trial of a real action, in which the jury are to inquire into the value of the land, had no buildings been erected or improvements made by the tenant, and the increased value by reason of such improvements, that such juror is interested in a similar question; but if the party neglects to take the objection before the trial, and to put the juror upon the *voir dire*, the exception comes too late after the trial; unless it

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appears that the party made the necessary inquiry, and failed of discovering the fact before the trial. *Jeffries & Al.* vs. *Kendall.* 205

4. Judgment upon mortgage may be entered upon filing an attested copy of the deed, instead of the original. *Union Bank* vs. *Thayer.* 362

5. Where an action is instituted by a judge of probate, upon a bond given to his predecessor in office, the Court will presume it to be a probate bond, within the provision of the statute of 1786, c. 55, § 3, requiring actions on such bonds to be commenced in this Court; and such actions, if commenced in the Court of Common Pleas, are not to be sustained. *White, Judge, &c.,* vs. *Quarles.* 451

6. Rules for the regulation of the practice in chancery. 466

See BAIL, 1.

PRESCRIPTION

See WAY, RIGHT OF, 1.

PRISONERS.

1. The oath prescribed for poor prisoners, in the statute of 1787, c. 29, need not be administered within the limits of the prison. *Commonwealth* vs. *Alden.* 388

PROBATE, JUDGE OF.

1. It is the duty of the judge of probate, before the appointment of a guardian to one as a lunatic, *non compos*, &c., to give notice to the party that he may be heard on the question whether such appointment be necessary or proper. *Chase* vs. *Hathaway.* 222

2. Of proceedings in Courts of Probate. *Ibid.*

See INTESTATE ESTATES, 1.
PRACTICE, 5.

PROMISE.

1. A promise was to pay money, provided a certain seaman did not render himself on board a certain privateer, and proceed to sea, and perform his duty as a seaman on board the vessel. The seaman rendered himself on board, and proceeded to sea; but left the vessel in a foreign port. It was holden, that the money was due. *Bagley* vs. *Francis.* 453

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

RECOGNIZANCE.

1. The remission of the penalties of recognizances, provided by the statute of 1810, c. 80, was intended to apply only to cases of irresistible necessity or unavoidable accident, and for the relief of unfortunate sureties. *Commonwealth* vs. *Dana.* 65

RECORDING OF DEEDS.

See DEEDS, 1.
PATENT, 1.

REFEREES.

1. A demand made by copartners, annexed to a submission to referees, pursuant to the statute of 1786, c. 21, signed by one of the copartners, is a sufficient compliance with the statute. *Skillings* vs. *Coolidge & Al., in Error.* 43

2. When referees, under such a submission, awarded a sum certain, as due from one to the other of the parties, in full of all demands, and to such award added certain directions concerning merchandise, belonging to the debtor, and in the hands or under the control of the creditor, that the same should be sold, and the proceeds placed to the credit of the debtor, and the balance, after deducting the sum awarded, paid over to him; — this was holden not to vitiate the award. *Ibid.*

3. If referees, under the statute before referred to, agree upon their report during a session of the Court of Common Pleas, such report is regularly to be returned at the next succeeding term of the court. *Walker* vs. *Melcher, in Error.* 148

4. It is not erroneous for the Court of Common Pleas to enter judgment upon the report of referees for a less sum than that awarded by them; the party in whose favor the award is made releasing the amount of the difference between the two sums. *Phelps* vs. *Goodman, in Error.* 252

5. A demand annexed to a rule of reference under the statute is sufficiently made, if in the hand-writing of the party making it, as, "A B demands," &c., without being subscribed by him

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and it is competent for the Court of Common Pleas to receive evidence that it is in the hand-writing of the party. *Humphrey* vs. *Strong, in Error.* 262

See REVIEW, 1.

REMAINDER.

See EXECUTION, 1, 8.

RENT.

1. *Assumpsit* for use and occupation cannot be maintained by the assignee of a lease for life, although an express promise from the lessee to the assignee be proved. *Codman & Al.* vs. *Jenkins.* 93

REPLEVIN.

See BOND, 1.
PLEAS, &c., 4.

RETURN.

See SCHOOL DISTRICT, 1.

REVERSION.

1. Tenant in fee devises his whole estate to his wife during her widowhood, and after death or marriage, wills that it may be distributed in the same manner as if it had not been devised; and dies leaving several children. After his death, and before the marriage or death of his widow, one of his sons dies insolvent, leaving an only son and heir. It was holden, that the reversion was chargeable with the debts of the deceased son of the testator. *Whitney* vs. *Whitney.* 88

See EXECUTION, 1.

REVIEW.

1. No review lies upon a report of referees, appointed pursuant to the statute of 1786, c. 21, where the party found indebted had paid the sum awarded, and the report, with the acknowledgment of satisfaction, had been returned, and recorded, according to the statute. *Stone & Al.* vs. *Davis & Al.* 360

2. Where a declaration contained two counts for two several causes of action, and on one trial the plaintiff had obtained a verdict on one count, and on the second trial on the appeal had a verdict on the other, which was for a much less sum than that for which the first verdict was returned, he was holden entitled to a review of the action. *Rice* vs. *Townsend.* 366

RIGHTS, DECLARATION OF

See STATUTE, 3.

SCHOOL DISTRICT.

1. The return of the freeholder, upon a warrant from the selectmen for warning a meeting of the inhabitants of a school district, that he had warned them according to law, was held to be conclusive, in an action by one of the inhabitants against the assessors, for assessing a tax on him which had been voted at such meeting. *Saxton* vs. *Nimms & Al.* 315

SCIRE FACIAS.

1. Where a judgment creditor has extended his execution upon land not belonging to the judgment debtor, he may not sue out a *scire facias* under the statute of 1785, c. 6, without a previous application to the court from whence the execution issued. *Kendrick* vs. *Wentworth.* 57

2. *Scire facias* does not lie upon an order of the Court of Common Pleas, that the reputed father of an illegitimate child shall pay a weekly sum towards the maintenance of such child; and that he shall give a bond therefor, and to indemnify the town. *Woodcock* vs. *Walker.* 386

SEISIN.

See DOWER, 1, 2.

SETTLEMENT.

1. Expenses incurred in the support of a pauper, although within three months prior to the notice required by the statute, cannot be recovered, if they arose more than two years before the commencement of the action. *Harwich* vs. *Hallowell.* 184

2. Expenses incurred in the support of a pauper more than two years before action brought cannot be recovered, although the same plaintiffs have, in a former action, recovered from the same

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defendants expenses incurred for the support of the same pauper, without a new notice. *Hallowell* vs. *Harwich*. 186

3. If the overseers of the poor relieve the wants of the wife, whose husband has a legal settlement in another town, an action lies at the common law for the town whose overseers furnished the relief, against the husband, notwithstanding the statute remedy against the town wherein he is settled. *Hanover* vs. *Turner*. 227

4. A pauper had a derivative settlement in a part of the town of A which was annexed to the town of B; but being of age, and out of the commonwealth, at the time of such annexation, his settlement continued in A. Afterwards the town of C was incorporated, and contained within its limits the tract of land in right of which the settlement was held. In the act incorporating C, it was provided that persons who had gained a settlement in the part of B which by the act was made a part of C, and who should thereafter need support, should be supported by C. This latter town was holden liable for the support of the pauper, although never in fact settled in B. *Great Barrington* vs. *Lancaster*. 253

5. Where one, before the 10th of April, 1767, had hired a house, but, before the removal of his family into it, had gone abroad, and in his absence his family removed into it, and were not warned to depart within twelve months from such removal, he gained a settlement in the town in which such house was situate. *Hardwick* vs. *Raynham*. 363

6. Under the provincial act of 7 *Geo.* 3, c. 3, illegitimate children acquired no settlement by birth, but had the settlement of their mother. *Newton* vs. *Braintree*. 382

7. To gain a settlement in the fourth method described in the statute of 1793, c. 34, § 2 a citizen must dwell in the town *the same* three years that he holds therein an estate of the prescribed value. *Boston* vs. *Wells*. 384

8. A surgeon, who had performed a difficult operation on a pauper, not resident in the town where he had his settlement, without the application of the overseers of such town, has no right of action therefor against the town where the pauper was settled. *Miller* vs. *Somerset*. 396

9. Where a pauper had immediate need of a surgical operation, in a town in which he was not legally settled, and the same was performed by a surgeon not belonging to such town, without the request of the overseers of the poor, the town where the pauper resided was holden not liable; and the surgeon not having made a demand within three months, it was holden, that the town would not have been liable, if the surgeon had been an inhabitant of the town. *Kittredge* vs. *Newbury*. 448

SHERIFF.

See ATTACHMENT, 1, 2, 3, 4
INDICTMENT, 1.
PLEAS, &c., 3.

SLAVE.

1. The conveyance of a slave by the deed of an agent, authorized by writing only from the owner, was held sufficient to transfer the property in the slave. *Stockbridge* vs. *West Stockbridge*. 257

2. And a slave so conveyed was held to have been the slave of the purchaser, notwithstanding his determination and promise not to hold him more than ten years. *Ibid*

STATUTE.

1. Of the construction of statutes. *Whitney* vs. *Whitney*. 88

2. The bills or notes of banks not incorporated by this commonwealth were prohibited by statute to be received, or in any way negotiated, by the banking corporations within the commonwealth, under a heavy penalty. It was holden, that a promissory note, payable in such bills to a banking corporation, made while the statute was in force, was void; and that no action could be maintained upon it by the promisees, after the statute was repealed. *Springfield Bank* vs. *Merrick & Al*. 322

3. The statute of 1811, c. 6, entitled "*An Act respecting public worship and religious freedom*," is not repugnant to the declaration of rights. *Adams* vs. *Howe & Al*. 340

See APPEAL, 2.
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TAXES.

1. Of the sale of lands of non-residents for the payment of taxes. *Pejepscut Proprietors* vs. *Ransom.* 145

2. In support of the title to land sold by a collector for the non-payment of taxes, proof of the return of the valuation, and of a copy of the assessment, to the town clerk's office is indispensable. *Blossom* vs. *Cannon.* 177

TRESPASS.

See Partition, 1.

TURNPIKE.

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TITHINGMAN.

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VOIR DIRE.

See PRACTICE, 3.

VOTERS.

1. One who had *bonâ fide* received, on the morning of the first Monday of April, two hundred dollars in advance of his yearly salary, was holden to possess the pecuniary qualification required by the constitution to entitle a citizen to vote in the election of governor, &c. *Bridge* vs. *Lincoln & Al.* 367

WAY.

1. Of the right of way over the land of another by prescription. *Gayetty* vs. *Bethune.* 49

WILLS.

1. Doubtful words in a will are not to operate the exemption of the testator's personal property from the payment of debts, and charging them on the real estate. *Seaver* vs. *Lewis & Ux.* 83

2. An instrument purporting to be a last will and testament, revoking all former wills, must have the same attestation, &c., to operate as a revocation, as is requisite to give it validity as a will. *Reid & Ux.* vs. *Borland.* 208

3. A testator, among other descendants, left sundry children of a deceased daughter. In his will he mentions her husband as his son-in-law, and gives a legacy to one of the said grandchildren from which it was inferred that he had not forgotten the other children of his said daughter; and that they were therefore not entitled to a proportion of his estate, as if he had died intestate, under the provision of the statute of 1793, c. 24, § 8. *Wilder* vs. *Goss.* 357

4. The lands of deceased testators are not chargeable with legacies bequeathed in any last will, unless such will be executed in the manner prescribed for devising real estate. *Winslow & Al., Appellants.* 422

5. No action lies on a bond given by an executor, for the faithful execution of his trust, for the benefit of a legatee, to whom a personal legacy is bequeathed, and payable at a day certain, until after a demand of the legacy, by the legatee upon the executor. *Prescott, Judge, &c.*, vs. *Parker & Al.* 428

See REVERSION, 1.

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